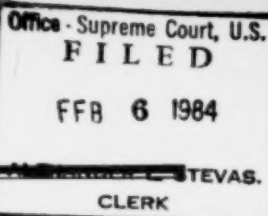


83-1298

No.



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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OIL, CHEMICAL, AND ATOMIC WORKERS  
INTERNATIONAL UNION AND ITS LOCAL 4-23,  
v. *Petitioners,*

RAYMOND J. DONOVAN, SECRETARY OF LABOR,  
and

AMERICAN PETROFINA CO. OF TEXAS,  
*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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## QUESTION PRESENTED

Rule 100 of the Occupational Safety and Health Review Commission's rules of procedure requires that a settlement that would resolve a case within the Commission's jurisdiction must be submitted to the Commission for a determination as to whether the settlement is consistent with the objectives of the Act and that the representative of the affected employees—as a party to the case—be afforded an opportunity to voice its views concerning the settlement.

The question presented here is whether the court below erred in holding that this Commission regulation is invalid and that the Commission is without authority to review the settlement of cases within its jurisdiction.

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IN THE  
**Supreme Court of the United States**

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OIL, CHEMICAL, AND ATOMIC WORKERS  
INTERNATIONAL UNION AND ITS LOCAL 4-23,  
*Petitioners,*

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,  
and

AMERICAN PETROFINA CO. OF TEXAS,  
*Respondents.*

---

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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The Oil, Chemical and Atomic Workers International Union, and its Local 4-23, hereby petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment in *Donovan v. Oil, Chemical and Atomic Workers International Union*, 718 F.2d 1341 (5th Cir. 1983).

**OPINIONS BELOW**

The two opinions of Administrative Law Judges of the Occupational Safety and Health Review Commission ("OSHRC") approving the settlement agreements at issue here are not officially reported, and are reprinted as

Appendices E and F to this petition. The two orders of OSHRC directing review of the ALJ opinions are not officially reported, and are reprinted as Appendices C and D. The order of OSHRC denying the Secretary of Labor's motion to vacate the direction for review is not officially reported and is reprinted as Appendix B. The decision of the Court of Appeals for the Fifth Circuit granting the Secretary's petition for review is reported at 718 F.2d 1341, and is reprinted as Appendix A.

### **JURISDICTION**

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 7, 1983. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### **STATUTORY PROVISIONS INVOLVED**

The statutory provisions involved are reprinted as Appendix G to this petition.

### **STATEMENT OF THE CASE**

In September-October, 1979 and again in November, 1979, authorized representatives of the Secretary of Labor ("the Secretary") conducted inspections pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the OSH Act" or "the Act") of the Port Arthur, Texas, oil refinery of American Petrofina Company of Texas ("the Company"). Each of those inspections uncovered numerous violations of the Act, including, of particular relevance here, several violations of the standard governing occupational exposure to asbestos that the Secretary had promulgated, 29 C.F.R. § 1910.1001.

Following each inspection the Secretary issued citations charging the Company with numerous serious (and some non-serious) violations of the Act.<sup>1</sup> The first citation

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<sup>1</sup> Under § 17 of the Act, 29 U.S.C. § 666, the penalty for a violation depends, *inter alia*, upon whether the violation is found to be willful, serious, or non-serious.

charged the company, *inter alia*, with failing to conduct monitoring of asbestos exposure levels in an area of the plant in which asbestos insulation was being removed as part of a construction project; the second citation charged the company with, *inter alia*, a further failure to conduct monitoring during this construction project, a failure to label asbestos-containing materials, and a failure to properly dispose of asbestos waste. The Secretary proposed penalties totaling \$6,100.

#### **Proceedings Before The Occupational Safety and Health Review Commission**

The employer filed a timely notice of contest of each citation in accordance with § 10(c) of the Act, 29 U.S.C. § 659(c). The Secretary notified the Occupational Safety and Health Review Commission ("OSHRC" or "the Commission") of these notices of contest as required by the Act, *id.*, and a complaint and an answer were filed in each case with the Commission. Petitioners Oil, Chemical and Atomic Workers International Union and its Local 4-23 (collectively referred to herein as "the Union"), the bargaining representative of the production and maintenance workers at the Company's Port Arthur refinery, elected "party" status pursuant to § 10(c) of the Act, 29 U.S.C. § 659(c) and Rule 20 of the Commission's rules of procedure, 29 C.F.R. § 2200.20.

On November 13, 1980, the Secretary and the Company reached settlement agreements in each case. Under those agreements, certain of the asbestos-related items were withdrawn from the Secretary's citations, others were downgraded from serious to non-serious violations, and the proposed penalty was reduced to \$680. Of even more importance from the perspective of the Union, the settlements represented that the cited conditions had been abated, and required no abatement action.

Pursuant to Rule 100 of the Commission's rules of procedure, 29 C.F.R. § 2200.100, the Secretary and the

Company submitted their settlement agreements to the Administrative Law Judges to whom the two cases were assigned. The Union urged that the settlements not be approved by the ALJs, contending, *inter alia*, that the asbestos-related violations had not been abated and that therefore the settlements were contrary to the purposes of the Act.<sup>2</sup>

The ALJs to which the two cases were assigned issued decisions approving the settlements and overruling the Union's objections. The Union petitioned the Commission for discretionary review in each case and the Commission granted those petitions.

On February 25, 1983, the Secretary filed a "Motion to Vacate the Commission's Direction for Review." In that motion the Secretary contended that "the decision to settle a case properly belongs to the Secretary and the Commission is without jurisdiction to review the Secretary's determination." The Secretary recognized only one exception to this asserted rule: because under the first sentence of § 10(c) of the Act, 29 U.S.C. § 659(c), a union may initiate a contest of a citation before the Commission if the union believes the time period provided for abatement in the citation is unreasonably long, the Secretary acknowledged that a union likewise could object to a settlement on this ground. The Secretary argued, however, that "other objections are not permitted."

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<sup>2</sup> The Secretary's citations had involved a construction project at a particular location within the plant; the representation that the violation had been abated was based solely on the fact that the particular project had been completed. It was the Union's contention that the same violations would occur elsewhere at the plant as soon as construction was started in those other locations; the Union argued that the employer by contesting the citation while the construction was in progress had effectively avoided any duty to take any corrective action whatsoever, and that to prevent recurrence of the problem the settlement should have required the Company to comply with the asbestos standard throughout the plant during future construction.

On March 25, 1983, the Commission entered an order denying the Secretary's motion. On April 6, 1983, the Secretary filed a petition for review in the United States Court of Appeals for the Fifth Circuit challenging the Commission's failure to vacate the direction for review.<sup>3</sup>

### **The Decision of the Court of Appeals**

On November 7, 1983, the court of appeals issued its decision granting the Secretary's petition for review and directing the Commission to vacate its review order and to dismiss the Union's request for Commission review of the settlements. That court reached this result through an unusual and tortuous course.

The court of appeals devoted the great bulk of its opinion to demonstrating why the Secretary's legal position is wrong and why it is appropriate for the Commission to entertain union objections to a settlement agreement.<sup>4</sup> The court below concluded: "[w]ere we writing on a clean slate, we would be inclined to uphold the

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<sup>3</sup> The petition for review referred to in text actually was the second petition for review that the Secretary filed. In his motion to vacate the direction for review the Secretary stated that "if the Commission does not vacate the directions for review within five (5) days of the filing of this Motion, that failure shall be treated as a denial of the motion for purposes of further proceedings in this matter." On March 7, 1983—ten days after the motion was filed—the Secretary filed a petition for review apparently premised on the theory that the Commission's inaction as of that point should be treated as a denial of the motion.

Two weeks later the Commission entered the order referred to in text denying the Secretary's motion; the Secretary filed a second petition for review in court. Eventually, the Secretary's first, premature petition for court review was dismissed.

<sup>4</sup> That court first concluded that the Commission's order denying the motion to vacate the direction for review was an appealable order under *Cohen v. Beneficial Finance Industrial Corp.*, 337 U.S. 541 (1949). See App. 4a-8a. The Union does not seek review here of the decision on this question.

Union and Commission position, and to rule that an employee may seek review of the terms of a settlement agreement notwithstanding the employer's withdrawal of its notice of contest" (*id.* 19a); indeed, that court added that "it would be inconsistent" with its view of the statutory structure "to permit the employer to reach an *ex parte* agreement with the Secretary (*id.* 21a). But the court below went on to explain that because of opposite decisions in *other* circuits "we feel constrained to adopt the Secretary's interpretation" (*Id.* 22a). That court elaborated:

In an administrative territory as vast as is OSHA, the need for uniformity is apparent. Were we to march to the beat of our own drummer, a gross disparity would arise between the Secretary's ability to settle cases in this circuit and his ability to do so elsewhere. Therefore, rather than profess telepathy from the collective mind of the 1970 Congress, we acknowledge that the Act can reasonably be interpreted more than one way, and we adopt a course that at least will not precipitate administrative chaos. [*Id.* 23a]

The Union seeks to have this Court review the decision below and, through it, the decisions of the other circuits that the court below viewed as wrongly decided yet binding.

### REASONS FOR GRANTING THE WRIT

#### **I. The Courts of Appeals Have Reached Conflicting Conclusions on a Question Whose Resolution Is Central to the Enforcement of the Occupational Safety and Health Act.**

From its earliest days, the Occupational Safety and Health Review Commission has required that a settlement that would resolve a case within its jurisdiction must be submitted to the Commission for a determination as to whether the settlement is consistent with the objectives of



the Act. As part of this process the Review Commission requires that the representative of the affected employees—as a party to the case—be afforded an opportunity to voice its views concerning the settlement. These requirements are embodied in regulations that the Commission promulgated shortly after the Act was passed pursuant to an express grant of rulemaking authority, and to which the Commission has consistently adhered thereafter. See pp. 10-12, *infra*.

From the time these regulations were promulgated and continuing for eight years the Secretary of Labor—the official charged with the responsibility to make the inspections and issue the citations that precipitate proceedings before the Commission—accepted the validity of the Commission's regulations and submitted thousands of settlements of OSHRC cases to the Commission for its review. See pp. 11-12, *infra*. The Secretary has now made a complete about-face, maintaining that the Act grants him an absolute and unreviewable discretion to settle cases that are pending before the Commission and denies the Commission the authority to review settlements.

Because the Commission generally has been held not to be entitled to appear in court,<sup>8</sup> OSHRC has been unable to defend its own regulations and practice. But the authority of the Commission with respect to settlements has been litigated in a series of cases like the instant case in

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<sup>8</sup> See *Marshall v. Sun Petroleum Products Co.*, 622 F.2d 1176, 1180-84 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1061; *Oil, Chemical & Atomic Workers v. OSHRC*, 671 F.2d 643, 651-52 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 206; *Marshall v. OSHRC*, 635 F.2d 544, 547 (6th Cir. 1980); *Dunlop v. Don L. Cooney, Inc.*, 3 BNA OSHC 1109 (9th Cir. 1975); see also *Donovan v. Allied International Workers*, 11 BNA OSHC 1737, 1740 (8th Cir., Dec. 13, 1983) (dictum). As explained in those cases, early versions of the bills that became the OSH Act contained a provision which would have authorized the Commission to appear in court to defend its actions, but that provision did not survive in the bill that ultimately was enacted. *Marshall v. Sun Petroleum Products*, *supra*, 622 F.2d at 1182-83.



which the Secretary has sought to block a hearing requested by a union for the purpose of allowing the union to present objections to a settlement.

In these cases several courts of appeals have concluded—in two instances by divided votes—that notwithstanding its regulations and long-standing practice, the Commission does not have the authority to review a settlement even when a union which is party to the case objects to the settlement as inadequate to remedy the violation.<sup>6</sup> The court below reached the opposite conclusion: that court read the statute as allowing “an employee [to] seek [Commission] review of the terms of a settlement agreement” (pp. 5-6, *supra*). But in order to avoid the “administrative chaos” that the court below feared would result from conflicting holdings on this issue, that court set aside its understanding of Congress’ intent and acquiesced in the decisions of the other circuits (*see* p. 6, *supra*).

By thus ignoring its own best judgment as to the proper construction of the Act, the court below may have technically avoided a circuit conflict. But as the Secretary himself has acknowledged, the *reasoning* of the court below is “diametrically opposed” to that of other circuits and, indeed, “conflicts with” decisions of those circuits.<sup>7</sup> This disagreement among the circuits constitutes a sufficient ground itself for this Court to review the decision below.

Moreover, the importance of the question presented here to the overall enforcement of the Act cannot be

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<sup>6</sup> *See Marshall v. Sun Petroleum Products Co.*, *supra*, n.5 (divided opinion, Pollack, J., dissenting); *Donovan v. Allied Industrial Workers*, *supra*, n.5 (divided opinion, Arnold, J., dissenting); *Donovan v. OSHRC*, 713 F.2d 918 (2d Cir. 1983); *Donovan v. Steelworkers*, 11 BNA OSHC 1698 (4th Cir., Nov. 1, 1983). *See also Oil, Chemical and Atomic Workers v. OSHRC*, *supra*, 671 F.2d at 649 (dictum).

<sup>7</sup> Secretary of Labor’s Motion to Authorize Publication of Opinion (at 4) in *Donovan v. Steelworkers*, No. 82-1885 (4th Cir., Nov. 17, 1983).

overstated. What is at issue is whether workers—and the public generally—have any administrative recourse with respect to the Secretary's decision to settle an OSHRC case.

That question would be of great moment even if settlements were used only occasionally to resolve contested cases, for to sustain the Secretary's claim of unreviewable authority—as the court below has done—is to allow the Secretary *carte blanche* to enter into any settlement, regardless of whether the settlement flouts the policies of the Act or is tainted by corrupt or otherwise impermissible considerations. In fact, however, far from being used occasionally, settlements are employed to resolve over 90% of contested cases that come before the Commission.<sup>8</sup>

Thus, determining the appropriate role of the Secretary, the Commission, and employee representatives in the settlement process is critical to shaping the overall enforcement scheme of the Act.

## II. The Holding of the Court Below Is Contrary to the Language, Structure and Purpose of the OSH Act.

As just noted, the court below, while acquiescing in the decisions of other circuits to avoid "administrative chaos," nonetheless recognized that properly construed the OSH Act permits a union to "seek review of the terms of a settlement agreement"; indeed, in that court's view "it would be inconsistent with [the statutory scheme] to permit the employer to reach an *ex parte* agreement with the Secretary" (p. 6, *supra*). As we proceed to show, the

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<sup>8</sup> In *Mobil Oil Corp.*, 10 BNA OSHC 1905, 1932 n.18 (1982), *rev'd*, 713 F.2d 918 (2d Cir. 1983), Chairman Rowland, dissenting, reported that "Commission records reveal that, in fiscal 1981, 92.7% of case dispositions by Commission administrative law judges occurred prior to a hearing. These dispositions include settlements, withdrawals of citations by the Secretary, and withdrawals of notices of contest by employers." The Secretary advised the court below in the instant case that in fiscal year 1982 "the ratio of cases settled to hearings held . . . [was] roughly 10 to 1." Supplemental Memorandum for the Secretary at 2 & n.1; see also App. 28a.

lower court's understanding of the Act accords with Congress' intent, and its holding, acquiescing in the contrary decisions by other courts, is erroneous.

A. We start, of course, with the language of the statute. Under the Act, the Commission's jurisdiction is invoked when an employer files a notice of contest of a citation issued by the Secretary. § 10(c), 29 U.S.C. § 659 (c). The Act does not prescribe in detail the procedures to be followed in resolving cases once the Commission's jurisdiction has been invoked; instead what the Act provides is that

The Commission is authorized to make such rules as are necessary for the orderly transaction of its proceedings. Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure. [§ 12(g), 29 U.S.C. § 661(f)]

The Act adds one further requirement:

The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings. . . . [§ 10(c), 29 U.S.C. § 659 (c)]

B. The OSH Act became effective on April 28, 1971. In August, 1971, the Review Commission issued interim rules, 36 Fed. Reg. 169 (Aug. 31, 1971), and in September, 1972 the Commission promulgated permanent regulations, 37 Fed. Reg. 20239 (Sept. 28, 1972), to govern proceedings in cases before it. Both the interim and permanent rules provided for Commission review of settlements. Rule 23 of the interim rules stated:

If all parties agree, settlement will be allowed at any stage of the proceeding, *subject to the approval of the Examiner* who shall certify that such settlement is consistent with the provisions of the Act. Settlement agreements submitted by the parties shall be accompanied by an appropriate proposed order. [36 Fed. Reg. 169; emphasis added]

Rule 100 of the permanent rules carried forward the same requirement with more detail:

(a) Settlement is encouraged at any stage of the proceedings where such settlement is consistent with the provisions and objectives of the Act.

(b) Settlement agreements submitted by the parties shall be accompanied by an appropriate proposed order.

(c) Where parties to settlement agree upon a proposal, it shall be served upon represented and unrepresented affected employees. . . . [37 Fed. Reg. 20239] \*

Pursuant to this regulation, the Commission, from its earliest days, has undertaken to review settlement agreements to assure that they are "consistent with the provisions and objectives of the Act."<sup>10</sup> The Secretary ac-

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\* Rule 100 has since been amended, 44 Fed. Reg. 70106 (Dec. 5, 1979), but the substance of the rule remains unchanged; indeed the Rule is now even more explicit in requiring Commission approval of settlements as the Rule now states: "A settlement proposal shall be approved when it is inconsistent with the provisions and objectives of the Act." 29 C.F.R. § 2200.100.

The Commission's regulations also provide—and have provided from the very beginning—that to withdraw a notice of contest, the employer must obtain leave of the Commission. 29 C.F.R. § 2200.100a; see also 36 Fed. Reg. 169 (interim rule 11); 37 Fed. Reg. 20239 (permanent rule 50); *Dawson Brothers—Mechanical Contractors*, 1 BNA OSHC 1024 (1972); *Gurney Industries, Inc.*, 1 BNA OSHC 1218 (1973), *app. dismissed* No. 73-1813 (4th Cir. 1973).

In this regard, the Commission's regulations parallel Rule 41 of the Federal Rules of Civil Procedure which provides that after an answer is filed, an action may be dismissed only by order of a court or with the consent of all parties.

<sup>10</sup> See, e.g., *Dawson Brothers—Mechanical Contractors*, *supra*, n.9; *Gurney Industries, Inc.*, *supra*, n.9; *Matt J. Zaich Construction Co.*, 1 BNA OSHC 1225 (1973); *Blaisdell Manufacturing Inc.*, 1 BNA OSHC 1406 (1973); *American Airlines, Inc.*, 2 BNA OSHC 1391

cepted the validity of Rule 100 for years, and submitted tens of thousands of proposed settlements to the Commission for its approval; indeed, in this very case the Secretary submitted the settlements to the Commission along with a "motion to affirm" (App. 38a). And in other cases the Secretary actually invoked the Commission's authority to *set aside* a settlement where union objections had not been considered or where the settlement was otherwise inconsistent with the requirements of the Act as construed by the Commission.<sup>11</sup>

It is, of course, settled that an administrative agency's long-standing and consistent interpretation of the law the agency is charged with administering is entitled to great deference from the courts especially where, as here, that interpretation is embodied in a regulation which the agency is expressly authorized to promulgate. *E.g.*, *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 36-39 (1981). Such deference is especially appropriate here since the Commission's interpretation of the Act dates to the passage of the Act and was accepted by the Secretary at that time and for many years thereafter. *Cf. Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933).

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(1974); *Logan County Farm Enterprises, Inc.*, 7 BNA OSHC 1275 (1979); *Globe Industries, Inc.*, 7 BNA OSHC 1312 (1979); *Farmers Export Co.*, 8 BNA OSHC 1655 (1980); *Weldship Corp.*, 8 BNA OSHC 2044 (1980); *Raybestos Friction Materials Co.*, 9 BNA OSHC 1141 (1980).

<sup>11</sup> See, *e.g.*, *Weldship Corp.*, *supra*, 8 BNA OSHC at 2045; *Kaiser Aluminum & Chemical Corp.*, 6 BNA OSHC 2172, 2173 (1978); *American Airlines, Inc.*, *supra*, 2 OSHC at 1391-92.

In 1978, the Commission proposed revisions to Rule 100 and publicly solicited comments on its proposal. 43 Fed. Reg. 36854 (Aug. 18, 1978). The Secretary submitted an extensive Statement of Position at that time in which he stated that "we have no objections to most of the provisions of Rule 100," and urged only that the Commission not require that a proposed settlement be served upon employee representatives ten days before the settlement was submitted to the administrative law judge; the Secretary suggested instead that "em-

C. The statutory structure and legislative history of the Act confirm that the Commission acted within its authority in promulgating Rule 100.

1. The requirement that the Commission approve of a settlement agreement in pending cases comports with the language of the Act concerning OSHRC proceedings. The first two sentences of § 10(c), 29 U.S.C. § 659(c), which govern cases before the Commission, provide in pertinent part as follows:

If an employer notifies the Secretary that he intends to contest a citation . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing. . . . The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief. . . .<sup>12</sup>

This provision thus contemplates that cases that come before the Commission will be resolved by a Commission "order."<sup>13</sup> This is precisely the effect of Rule 100's re-

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employees can be adequately protected by providing that the proposed settlement be filed with the judge and served simultaneously on employees and that the judge delay his decision to approve or disapprove the settlement for 10 days" during which time "employees may file their objections to the settlement." The Commission accepted the Secretary's position in its final regulation. See 29 C.F.R. § 2200.100(c).

<sup>12</sup> We discuss the elided portion of the first sentence having to do with cases precipitated by an employee representative rather than by an employer at pp. 18-21, *infra*.

<sup>13</sup> See also § 12(j), 29 U.S.C. § 661(i) :

An administrative law judge appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith . . . and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the administrative law judge shall become the final order of the Commission within thirty days . . . unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

quirement that settlement agreements be submitted to the Commission for its review.

2. By allowing employees or their representatives to be heard on objections to settlements, Rule 100 implements the command of the final sentence of § 10(c) which directs the Commission to "provide affected employees or representatives . . . an opportunity to participate as parties to hearings." As the court below observed, "[t]he word 'parties' usually connotes persons entitled to participate fully in litigation (App. 15a; *see id.* 21a).<sup>14</sup> And "it would be inconsistent with that view to permit the employer to reach an *ex parte* agreement with the Secretary" (*Id.* 21a).

Indeed, as the court below also recognized, in enacting the OSH Act, Congress "attempted to erect a comprehensive structure that would allow for meaningful participation of those most personally concerned with workplace safety—the workers" (*Id.* 16a). The portion of § 10(c) just quoted is one piece of this "comprehensive structure."<sup>15</sup> And it would be contrary to the structure as a whole—as well, as to the literal words of § 10(c)—to deny employees any meaningful role at the critical stage at which the Secretary seeks to compromise a citation.

3. By providing a check on the Secretary's authority to settle cases, Rule 100 furthers the congressional policies underlying the creation of OSHRC. The legislative history makes clear that, as Senator Javits, the ranking

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<sup>14</sup> "[W]here words are employed in a statute which had at the time a well-known meaning . . . in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary." *Lorillard v. Pons*, 434 U.S. 575, 583 (1978). This is so because "Congress is predominantly a lawyer's body, and it is appropriate for us 'to assume that our elected representatives know the law.'" *Albernaz v. United States*, 450 U.S. 333, 341 (1981).

<sup>15</sup> For a detailed review of the structure of the Act as a whole insofar as it pertains to employee participation, *see Marshall v. Sun Petroleum Products Co.*, *supra*, 622 F.2d at 1189-90 n.3 (Pollack, J., dissenting).



Republican on the Senate Committee on Labor and Public Welfare, observed, "[t]he key issue" in the debates, and one so hotly contested "as to jeopardize seriously the prospects for enactment of th[e] bill," was whether enforcement of the Act should be assigned to the Secretary, who would also have investigatory and prosecutorial functions, or to an independent agency.<sup>16</sup> Those who urged separating these functions argued:

The concentration of all authority for the promulgation of standards, the inspection and investigation of complaints, the prosecution of cases, and the adjudication of cases, totally in the hands of the Secretary of Labor is not a balanced approach.

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It is objectionable because concentration of power gives rise to a great potential for abuse. *A single man is easier to harass than an independent board or commission.* Political pressure can be concentrated to achieve a particular point of view or course of action.<sup>17</sup>

After prolonged debate, Congress adopted this view, deciding that enforcement cases would be resolved by a panel of Commissioners "appointed solely on the basis of their professional qualifications,"<sup>18</sup> which "would not be

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<sup>16</sup> S. Rep. No. 91-1282, 91st Cong., 2d Sess. 55-56 (1970) (individual views of Sen. Javits), reprinted in Sen. Subcomm. on Labor of the Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* (Comm. Print 1971) ("Leg. Hist.") at 193-194.

<sup>17</sup> *Id.* at 420 (Sen. Dominick) (emphasis added). Senator Dominick "played a prominent role" in the Senate's consideration of the legislation. *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 517 (1981). See, e.g., Leg. Hist. at 526 (Sen. Javits); *id.*, at 527 (Sen. Williams).

<sup>18</sup> *Id.* at 392 (Sen. Javits). Under the statute, the members of the Commission are required to be specially qualified "by reason of training, education or experience in the field." 29 U.S.C. § 661(a). In addition, each Commissioner is appointed to a six-year term



a Labor Department instrument.”<sup>19</sup> Reviewing settlement agreements thus is entirely in keeping with the mission Congress entrusted to the Commission.<sup>20</sup>

D. In the face of the statutory language and structure just reviewed, the courts that have invalidated Rule 100

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and cannot be removed except for “inefficiency, neglect of duty, or malfeasance in office.” 29 U.S.C. § 661(b).

<sup>19</sup> Leg. Hist. at 462-463 (Sen. Javits).

<sup>20</sup> In deciding to separate prosecutorial and adjudicative functions, Congress had in mind the model of the National Labor Relations Act. See Leg. Hist. at 334 (Senator Saxbe); *id.* at 473 (Senator Holland). At the time the OSH Act was enacted—as today—the regulations of the NLRB contemplated that once the General Counsel filed a complaint with the Board, the case ordinarily would not be settled without the consent of the Board, see 32 Fed. Reg. 9547 (July 1, 1967); indeed, the Third Circuit had held that “[a]nything less . . . is arbitrary and capricious.” *Leeds & Northrop Co. v. NLRB*, 357 F.2d 527, 533 (3d Cir. 1966). It was equally clear, at the time the OSH Act was enacted, that when a settlement was submitted to the Labor Board for its consideration “the Board, like a court presented with a consent decree, is not required to enter it.” *Teamsters Local 282 v. NLRB*, 339 F.2d 795, 799 (2d Cir. 1964). And while the precise scope of the rights of a charging party to object to a proposed settlement of an unfair labor practice complaint were not completely fixed as of 1970, it was generally understood that the charging party “is given the opportunity for submission of facts and argument and is recognized as having a substantial part in assisting the Board in fulfilling its public responsibilities.” *Textile Workers of America v. NLRB*, 294 F.2d 738, 740 (D.C. Cir. 1961); see also *Marine Engineers Benevolent Ass’n v. NLRB*, 202 F.2d 546 (Sd Cir. 1953), *cert. denied*, 346 U.S. 819; *Leeds & Northrop Co. v. NLRB*, *supra*; *Auto Workers v. NLRB*, 231 F.2d 237, 242 (7th Cir. 1956) (dictum).

As Judge Pollack concluded in *Marshall v. Sun Petroleum*, *supra*, “[i]t is improbable that Congress, writing against this backdrop of the National Labor Relations Act practice, could have intended any lesser role for the complaining employees under OSHA by explicitly providing them the right ‘to participate as a party.’” 622 F.2d at 1191 n.5.

have relied on two principal arguments; neither supports the conclusion those courts have reached.

1. The first argument that has been invoked to preclude Commission review of settlement agreements proceeds from the undeniable proposition that under the Act, "neither the Commission nor the Union c[an] force [the Secretary] to bring the citation in the first place, or to prosecute it if he decided it was not worth pursuing." *Donovan v. Allied Industrial Workers*, *supra*, 11 BNA OSHC at 1741. From this premise the courts have erroneously leaped to the conclusion that the Secretary's prosecutorial discretion is such that once he decides to settle a case the Commission's role is necessarily at an end.<sup>21</sup>

In other contexts it is well-established that once the jurisdiction of an adjudicative tribunal attaches, the tribunal's jurisdiction is not automatically defeated simply because the party who initiated the case chooses to abandon it; this is true, for example, under the NLRA, *see* n.20, *supra*, and under the Federal Rules of Civil Procedure, *see* n.9, *supra*. Indeed, if the rule were otherwise any statute that vested exclusive prosecutorial authority in a public prosecutor necessarily would give the prosecutor unfettered and unreviewable discretion to settle cases without consideration of the objections of

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<sup>21</sup> *See also* *Marshall v. Sun Petroleum Products Co.*, *supra*, 622 F.2d at 1184-85; *Donovan v. OSHRC*, *supra*, 713 F.2d at 926-27, 930.

As a corollary to the prosecutorial-discretion argument, the courts also have maintained that since an employer's notice of contest ordinarily is required to create OSHRC jurisdiction, the withdrawal of such notice necessarily divests the Commission of jurisdiction. *See id.* But this argument assumes its conclusion, for the very issue here is whether an employer may withdraw his notice of contest absent the Commission's consent. And as explained in text there is nothing unusual or illogical in concluding that once a tribunal's jurisdiction attaches to a case, a party's desire to withdraw a document that was necessary to confer jurisdiction in the first instance is not *ipso facto* sufficient to divest the tribunal of jurisdiction.

other parties such as intervenors. For in each such case it would be true that the tribunal's jurisdiction depended in the first instance upon the prosecutor's decision to prosecute. Yet "[i]n appropriate circumstances the Court has made clear that traditions of prosecutorial discretion d[o] not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were . . . contrary to law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980); cf. *Dunlop v. Bachowski*, 421 U.S. 560 (1975).<sup>22</sup>

Moreover, in the context of the OSH Act in particular, it is not at all anomalous that while a citation and notice of contest are required to create Commission jurisdiction, a settlement between the Secretary and the employer does not preclude the Commission from entertaining employee objections to the settlement. As the court below explained:

By conditioning [employees'] full participation on the employer's filing of a notice of contest, the Act can be seen as striking a balance between expeditious prosecution of citations (allowing uncontested ones to become final . . .) and the employees' protection of their interests when it becomes more important to do so fully by providing them an equal voice once the employer has contested the citation, and by preventing the employer and the Secretary from concluding an agreement prejudicial to the employees' interests without their participation. [App. 22a]

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<sup>22</sup> The invocation of prosecutorial discretion in an attempt to defeat Commission review of settlement agreements is particularly inappropriate with respect to the OSH Act because of the extent to which the Act limits such discretion. Under the Act, the Secretary is *required* to investigate a workplace if the union provides facts which establish reasonable cause to believe a violation exists, *see* 29 U.S.C. § 657(f), and the Secretary is *required* to prosecute if the Secretary's investigation establishes reason to believe that a violation exists, *see, id.* § 658(a). And when the Secretary issues a citation, the Act further limits the Secretary's prosecutorial authority by requiring that, in any hearing, a union must be afforded the opportunity "to participate as [a] part[y]," 29 U.S.C. § 659(c), thus depriving the Secretary of exclusive control over the presentation of the case to the Commission.

2. The courts that have ruled that the Commission may not review settlements also have placed great stress on the portion of the first sentence of § 10(c) of the Act, 29 U.S.C. § 659(c), which authorizes employee representatives to initiate cases before the Commission if—but only if—the representative “alleg[es] that the period of time fixed in the citation for the abatement of the violation is unreasonable.” The courts have concluded that this limitation on the range of issues that a union may on its own bring to the Commission necessarily limits the range of issues that a union may raise—or that the Commission may consider—in a challenge to a settlement.<sup>23</sup> Again, the reasoning is fallacious.

As the court below recognized, § 10(c) “establishes a two-tier scheme” for OSHRC cases (App. 14a). Under the first tier, cases are initiated by an employer’s notice of contest. For this tier—the tier in which the Secretary and the employer may attempt to resolve a case by settlement—the Act “contains no language limiting the employees’ participation” (*id.* 15a); to the contrary, the final sentence of § 10(c) provides without limitation that the employees shall be afforded “an opportunity to participate as parties” which usually means “to participate fully in litigation” (*see* p. 14, *supra*). Thus, as the court below stated “[i]f . . . the employer disputes the citation, the employees are provided an opportunity to have an equal voice in proceedings that might result in the modification or revocation of the citation.” App. 17a; *see also Oil, Chemical and Atomic Workers v. OSHRC, supra*, 671 F.2d at 647-48; *Donovan v. Allied Industrial Workers, supra*, 11 BNA OSHC at 1746; *General Electric Co.*, 3 BNA OSHC 1031, 1038-39, 1048-49 (1975), *vacated in part on other grds*, 540 F.2d 167 (2d Cir. 1976).

The second tier of cases arises only if the employer does not contest any part of the citation (including the Secretary’s determination of a violation and his proposed pen-

<sup>23</sup> E.g., *Marshall v. Sun Petroleum Products Co.*, *supra*, 622 F.2d at 1186; *Donovan v. OSHRC, supra*, 713 F.2d at 928-29.

alty). In that event, the first sentence of § 10(c) is called into play and confers independent jurisdiction on the Commission to adjudicate employee-initiated contests if—but only if—the employees challenge the abatement date provided for in the citation.<sup>24</sup>

A first-tier case such as this differs from a second-tier case in two key respects. First, in this case, the Commission already has obtained jurisdiction by virtue of the employer's notice of contest; the issue here is whether that admitted jurisdiction may continue to be exercised and not the question that § 10(c) addresses, whether to create Commission jurisdiction in the first instance. Second, the employer here has not acceded to the Secretary's citation but has negotiated a compromise of his dispute with the Secretary—a compromise in which the Secretary withdrew certain items from the citation, downgraded others, reduced the penalty, and accepted the employer's representation that abatement had occurred. See p. 3 *supra*. Such a compromise necessarily implicates interests of affected employees that are not implicated when an employer simply accedes to the Secretary's citation.

Given these differences, the congressional judgment embodied in the first sentence of § 10(c) has no relevance

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<sup>24</sup> In *Mobil Oil Corp.*, *supra*, the Commission explained why, in its view, Congress chose to allow employee-initiated contests only with respect to abatement dates. The Commission stated:

Th[e] section of the statute authorizing the Secretary to issue citations makes no reference to abatement requirements or abatement plans, but refers only to the *time* for abatement of a violation. Similarly, section 10(c), in affording employees the right to file notices of contest with respect to abatement, uses parallel language concerning the period of time for abatement. Inasmuch as the manner for achieving abatement is not ordinarily set forth in the citation, it would be impossible for employees to file a notice of contest regarding the abatement method. As a result, it would be absurd for the Act to provide for employee notices of contest as to any aspect of abatement other than time, the only abatement factor required to be identified by section 9(a) of the Act. [10 BNA OSHC at 1919]

here; that section simply cannot be read as an indication of Congress' view as to how the Commission should exercise its jurisdiction, once that jurisdiction has attached, in a case in which the Secretary and employer have compromised disputed issues and in which the affected employees contend that that compromise does not comport with the Act.

Thus neither the language of the first sentence of § 10(c) nor broader concepts of prosecutorial discretion can negate the analytic conclusion of the court below: the Commission acted within its authority in promulgating Rule 100 and requiring that settlement of cases within its jurisdiction be submitted to it for its review. The court below thus erred in rejecting its own analysis in favor of the erroneous reasoning of other courts.<sup>25</sup>

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<sup>25</sup> The courts that have rejected the Commission's assertion of authority to review settlements have also invoked policy considerations, reasoning that Commission review will impede the Secretary's ability to settle cases and delay the implementation of settlement agreements. See *Donovan v. Allied Workers*, *supra*, 11 BNA OSHC at 1741-42; *Donovan v. OSHRC*, *supra*, 713 F.2d at 927. But these concerns—even assuming *arguendo* that they are properly considered at all given the statutory materials—are misplaced.

In the first place, there is no evidence to suggest that any of these feared evils have, in fact, materialized during the more than eight years in which the Commission's authority to review settlement agreements was unquestioned; to the contrary the Secretary succeeded in settling over 90% of all cases despite the existence of Commission review. See n.8 *supra*. Nor is there any logical basis to the fear that such review will impede the achievement or significantly delay the implementation of settlements. If a settlement plainly comports with the Act—and most undoubtedly do—little time or effort is required to establish that fact before the Commission; this no doubt explains why the prospect of Commission review has not deterred employers from entering into such settlements or significantly delayed their implementation. It is only if a substantial question exists as to whether a settlement is consistent with the Act—for example where, as petitioners maintain is the case here, the settlement fails to abate the hazard—that Commission review may become more time-consuming or costly. But in such cases the “costs” of review will be counterbalanced by the “benefits” that will be

# CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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realized in preventing a settlement from becoming final when the settlement fails to provide for adequate abatement or otherwise is inconsistent with the purposes of the Act. And in all events the availability of Commission review provides an important check on the Secretary and minimizes the risk that settlements will be negotiated that disserve the purposes of the Act.

## **APPENDICES**



APPENDIX A

UNITED STATES COURT OF APPEALS  
FIFTH CIRCUIT

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No. 83-4226 <sup>1</sup>

RAYMOND J. DONOVAN, SECRETARY OF LABOR,  
*Petitioner,*  
v.

OIL, CHEMICAL, AND ATOMIC WORKERS INTERNATIONAL  
UNION AND ITS LOCAL 4-23,  
*Respondent.*

Nov. 7, 1983

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Petition for Review of an Order of the  
Occupational Safety and Health Review Commission

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Before RUBIN, TATE and JOLLY, Circuit Judges.  
ALVIN B. RUBIN, Circuit Judge:

To further its purpose of assuring every working person "safe and healthful working conditions," Congress enacted the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (1970) (the Act). The Act provides for both an enforcement arm, under the Secretary of Labor, and an adjudicatory arm, under the Occupa-

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<sup>1</sup> This case initially involved two appeals: No. 83-4142, in which the Secretary appealed the commission's order directing the parties to brief the issues accepted for review; and No. 83-4226, which is the Secretary's appeal from the Commission's denial of his motion to vacate its review order. At oral argument, counsel for the Secretary informed the court that No. 83-4142 had been withdrawn. Thus, only No. 83-4226 remains in this appeal.

tional Safety and Health Review Commission (the Commission) established by § 7(a)(1) of the Act, 29 U.S.C. § 656(a)(1). The Secretary is responsible for promulgating workplace safety standards, which he enforces by inspecting employers' premises and by issuing citations and proposed penalties for violations. Employers are entitled to contest a citation at a hearing before an Administrative Law Judge of the Commission.<sup>2</sup> The Commission, in its discretion, may then review the ALJ's order. The Act also accords employees<sup>3</sup> certain rights to participate in both the enforcement and adjudicatory stages of the administrative process. In this case, we must determine whether the Act permits employees to challenge the terms of a settlement agreement struck between the Secretary and the employer, once the employer has withdrawn its contest to the citation.

## I.

As a result of inspections conducted in the fall of 1979, the Secretary of Labor issued four citations and notifications of proposed penalties to American Petrofina Company (the Company) for violation of safety regulations promulgated by the Secretary. In response, the Company filed notices of contest to the citations, which are prerequisites for an administrative hearing.<sup>4</sup> The citations

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<sup>2</sup> Non-contested citations become final and unreviewable in any tribunal. See *infra* note 4 and accompanying text.

<sup>3</sup> Because for present purposes the rights and duties of employees under the Act largely encompass those of their representatives, we use the term "employees" to include their representatives.

<sup>4</sup> Section 659(a) provides that the citation and proposed assessment "shall be deemed a final order of the Commission and not subject to review by any court or agency" if, within fifteen days of receipt of the Secretary's notice, the employer fails to file a notice of contest or the employees do not file a subsection (c) notice. Subsection (b) contains a similar provision, without the reference to employees, for employers that receive notice from the Secretary that they have failed to correct a violation.

were consolidated into two cases and set for two separate hearings before two different ALJ's.<sup>5</sup> After the employer had filed the notices of contest, but before each hearing, the Oil, Chemical, and Atomic Worker's International Union and its Local 4-23 (the Union) exercised the employees' right under § 10(c) of the Act, 29 U.S.C. § 659(c), to participate as parties to the proceedings.<sup>6</sup>

<sup>5</sup> The cases were designated OSHRC Docket No. 79-6847 and No. 80-1671. In No. 79-6847, citation 1, item 1, alleged that the company seriously violated § 5(a)(1), 29 U.S.C. § 654(a)(1), which requires employers to furnish employment "free from recognized hazards that are causing or likely to cause death or serious physical harm to employees," by hoisting materials over the heads of employees. Citation 1 also alleged the following serious violations of the Secretary's standards: (1) failure to clear debris (29 C.F.R. 1926.25(a)); (2) failure to protect employees against falls (29 C.F.R. 1926.28(a) and 1926.105(a)); (3) failure to guard an abrasive disk (29 C.F.R. 1926.303(b)); (4) failure to store oxygen cylinders properly (29 C.F.R. 1926.350(j)); (5) use of defective welding cable (29 C.F.R. 1926.351(b)(4)); and (6) failure to guard open-sided platforms (29 C.F.R. 1926.451(a)(4)). Citation 1, items 9a, 9b and 9c, alleged that the company seriously violated the asbestos standard by failing to conduct monitoring in the fluid catalytic cracking unit of employees who were removing asbestos insulation or working in areas where asbestos was being removed (29 C.F.R. 1910.1001(f)(1), .1001(f)(2)(1), .1001(f)(3)(i)). Citation 2 charged the company with two nonserious violations based on (1) failure to guard electrical equipment (29 C.F.R. 1926.400(a)), and (2) using defective ladders (29 C.F.R. 1926.450(a)(2)).

In No. 80-1671, Citation 1 alleged that the company violated 29 C.F.R. 1910.25(d)(1)(x) by using a defective ladder. Citation 2 alleged that the company seriously violated the asbestos standards in the fluid catalytic cracking unit by (1) failing to conduct initial monitoring (29 C.F.R. 1910.1001(f)(1)); (2) failing to collect representative samples (29 C.F.R. 1910.1001(f)(3)(i)); (3) failing to label asbestos-containing materials (29 C.F.R. 1910.1001(g)(2)(i)); and (4) failing properly to dispose of asbestos waste (29 C.F.R. 1910.1001(h)(2)).

<sup>6</sup> Pursuant to § 10(c), 29 U.S.C. § 659(c), the Commission promulgated Rule 20, which provides: "Affected employees may elect to participate as parties at any time before the commencement of the hearing before the judge, unless, for good cause shown, the

Before the respective hearings, the Secretary and the Company agreed to settle both the cases. In return for a reduction of the citations from "serious" to "non-serious" and elimination of the penalties, the employer agreed to withdraw its notices of contest. The Union had participated in the negotiations, but refused to join the agreements on the grounds that their terms were inconsistent with the Act.<sup>7</sup> After a hearing on the first citation, the ALJ rejected the Union's objections and approved the agreement. At the second hearing, another ALJ upheld the second agreement, and refused the Union's proffer of evidence purporting to show that certain asbestos-related violations were properly characterized as serious and that the Company had failed to take appropriate corrective measures when removing asbestos.

Undaunted, the Union next sought to invoke the Commission's discretionary authority to review the ALJ's rulings.<sup>8</sup> The Commission granted the Union's petition, provoking the Secretary to file a motion to vacate the order for review. From the Commission's denial of his motion, the Secretary brings this appeal.

## II.

The threshold issue is whether the Commission's denial of the Secretary's motion constitutes an appealable agency ruling. The judicial review provision of the Act allows "[a]ny person adversely affected or aggrieved by

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Commission or the judge allows such election at a later time. See also § 2200.21. [Intervention: appearance by non-parties]" 29 C.F.R. § 2200.20 (1981).

<sup>7</sup> Specifically, the Union objected in No. 79-6847 to reduction of the asbestos-related violations' reclassification from serious to non-serious and the agreement's statement that the violations had been abated. In the No. 80-1671 agreement, the Union disputed the terms that vacated asbestos-related violations and recharacterized the remaining asbestos-related violations as nonserious.

<sup>8</sup> See 29 U.S.C. §§ 659(c) and 661(i).

an order of the Commission issued under subsection (c) of section 659 [§ 10(c) of the Act] of this title" to obtain review in the courts of appeals.<sup>9</sup> Section 10(c) requires the Commission, if an employer contests a citation, to hold a hearing and "thereafter to issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief."<sup>10</sup> Because the Commission's order denying the Secretary's motion did not affirm, modify, or vacate the Secretary's citation or proposed penalty or order any other relief, it is not final and ordinarily would not be appealable. See *Stripe-A-Zone v. OSHRC*, 643 F.2d 230, 232-33 (5th Cir. 1981).

The Secretary contends that the Commission's decision is nevertheless reviewable under the "collateral order" doctrine of *Cohen v. Beneficial Finance Industrial Corp.*, 337 U.S. 541, 545-47, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528, 1535-37 (1949). "To come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen*, the order must [1] conclusively determine the disputed question, [2] resolve an important question completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351, 357 (1978) (footnote omitted). See also *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, — U.S. —, —, 103 S.Ct. 927, 935, 74 L.Ed.2d 765, 777 (1983).

The Second Circuit recently applied this test in a case remarkably similar to the present appeal, ruling that a Commission order remanding a proposed settlement agreement to the ALJ for consideration of the union's objections to the methods of abatement satisfied all three *Cohen* requirements. *Donovan and Mobil Oil Corp. v.*

<sup>9</sup> 29 U.S.C. § 660(a).

<sup>10</sup> See *infra* note 23 for a full quote of § 10(c). 29 U.S.C. § 659(c).

*OSHRC and PTEU*, 713 F.2d 918 (2d Cir. 1983) (*Mobil Oil*). Specifically, the court found that: the Commission's order conclusively determined the scope of the Secretary's authority to settle without Commission oversight or the employee's formal participation; the appeal presented an important question because it would resolve an impasse between two federal agencies, thus facilitating the Act's administration; and the issue of the Secretary's authority would not merge into a final judgment on the merits. *Id.* at 924-25. The third element of the *Cohen* test was more fully discussed by the Third Circuit in *Marshall and American Cyanamid v. OCAW and OSHRC*, 647 F.2d 383 (3d Cir. 1981) (*American Cyanamid*). The court reasoned that the Commission's order "irrevocably infringed" the Secretary's prosecutorial discretion because subsequent review of the final order would not have retroactive effect: the passage of time would obliterate the Secretary's negotiating position with the employer without accomplishing abatement. *Id.* at 387. *See also Marshall and IMC v. OSHRC*, 635 F.2d 544 (6th Cir. 1980) (*IMC*) (reviewing Commission order to remand case to allow employee representative to prosecute citation originally issued by the Secretary but subsequently withdrawn).

We reach the same result. Although the Commission has not yet issued a remand order, and therefore conceivably could approve the settlement, it has "conclusively determined" the disputed question. The Secretary is not arguing the validity of the settlement agreements on this appeal. Instead the issues here are the standing of the employees' representative to contest the agreement, and the Secretary's authority to conclude such an agreement shielded from review when the employer withdraws its notice of contest. By denying the Secretary's motion to vacate the review order, the Commission has, in effect, ruled on the issue of its jurisdiction to review settlement agreements and the proper scope of employee participa-

tion; those were the issues briefed by the Secretary in his motion to vacate the review order.

The Second Circuit's reasoning on the second prong of the *Cohen* test applies to the present case. In essence, the issues are identical and the need to settle them is evidenced by their recurrence in the various circuits. Additionally, because the arguments advanced by the parties in the present case are separable from the merits of the settlement agreement dispute, we need not consider the Union's objections to the agreements in ruling on this appeal.

Finally, we think *Cohen's* third requirement is satisfied. The complicated procedural history of this appeal presents a wrinkle not present in the cases discussed above. This case is a consolidation of two different hearings before the ALJ's, on two separate agreements that settled two distinct citations. At the first hearing, the ALJ considered the Union's objections and proffers of proof but, nevertheless, upheld the agreement; hence a remand is unlikely. In the second proceeding, on the other hand, the ALJ refused the Union's proffer of evidence. Should the Commission disapprove the agreements, therefore, it might remand for a hearing on the second agreement. In that event, this case would become like *American Cyanamid* and *IAM*, and the reasoning relied upon in those cases by the Third and Sixth Circuits would apply here. If, however, the Commission upheld the settlement agreements, then the issues here presented would escape review entirely because the Secretary could not appeal a victory.

This court's per curiam opinion in *Stripe-A-Zone v. OSHRC*, 643 F.2d 230 (5th Cir. 1981) does not control the disposition of this appeal. In *Stripe-A-Zone*, the employer appealed a Commission order vacating the ALJ's refusal to process a second citation based on essentially the same facts as one previously withdrawn by the Sec-



retary. The employer argued that its right not to be prosecuted twice for the same violation had been violated and therefore, although the Commission's order was not final, the appeal fit within the *Cohen* exception. We refused to accord *Stripe-A-Zone* the same absolute double jeopardy rights as a criminal defendant, and pointed out that the expense and trouble of litigation were simply part of the price of life under government. 643 F.2d at 233. Because *Stripe-A-Zone*'s rights could be adequately protected by an appeal from a final Commission order, we ruled that it had failed to satisfy the third *Cohen* requirement. *Id.* at 234. By contrast, the Secretary is not merely seeking to avoid the annoyance of litigation—although his argument subsumes that objection; he is arguing that his statutory authority will be usurped and that the Commission will be exceeding its jurisdiction if the employees are allowed to obtain review of the settlement agreements before the Commission. *See Engelhard Industries v. OSHRC and Lcl. 962, ICUW*, 713 F.2d 45, 48 & n.4 (3d Cir. 1983) (refusing to apply *Cohen* doctrine to allow employer to seek review of OSHRC decision remanding case for hearing of factual issues raised by union's objections; distinguishing the Secretary's right to settle cases and hence to seek interlocutory appellate review of Commission orders interfering with that right, as necessary to the Act's enforcement.)

Moreover, uniformity in procedural rules has independent value for litigants should not be required to determine their federal procedural right by reference to the jurisprudence of the circuit having jurisdiction of the appeal. We conclude, therefore, that the collateral order doctrine applies to this case. Accordingly, we proceed to consider the merits.

### III.

Simply stated, this appeal raises two questions: (A) what is the scope of employee participation bestowed by § 10(c) of the Act, 29 U.S.C. § 659(c); and (B) what is



the effect, if any, on those rights of an employer's withdrawal of its notice of contest? Because resolution of these issues requires us to interpret § 10(c) in light of its statutory context, a brief review of the Act will inform our discussion.

Congress placed primary responsibility for enforcement of the Act in the hands of the Secretary. *Dale M. Madden Construction, Inc. v. Hodgson*, 502 F.2d 278, 280 (9th Cir. 1974). He sets the standards for workplace safety,<sup>11</sup> enforces compliance by inspecting places of employment and by investigating reports of hazards, and prosecutes violations by issuing citations and proposing penalties to transgressing employers.<sup>12</sup> If the cited employer fails to file a notice of contest, the Secretary's citation and proposed penalty become final and unreviewable in any court.<sup>13</sup> The Act implicitly authorizes the Secretary to compromise, mitigate, or settle.<sup>14</sup> He has further authority to seek an injunction in federal district court when a practice or condition threatens to cause death or serious physical injury.<sup>15</sup>

Congress also has provided for employee participation in both the enforcement and adjudicatory stages of the

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<sup>11</sup> 29 U.S.C. § 655(a). See also 29 U.S.C. § 655(b)(6) (authorizing the Secretary to grant a temporary variance from the standards he promulgates).

<sup>12</sup> 29 U.S.C. §§ 658(a) and 659(a) & (b).

<sup>13</sup> See *supra* note 4.

<sup>14</sup> Section 6(c) provides:

Whenever the Secretary promulgates any standard, makes any rule, order or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this chapter, he shall include a statement of the reasons for such action, which shall be published in the Federal Register.

29 U.S.C. § 655(c). See *Dale M. Madden Construction, Inc. v. Hodgson*, 502 F.2d 278, 280 (9th Cir. 1974).

<sup>15</sup> 29 U.S.C. § 662(a)-(c).

administrative process. Participation in the enforcement stage includes the right to accompany the Secretary when he inspects the workplace;<sup>16</sup> and if the conditions present imminent danger of causing physical harm, the employee may request the Secretary to inspect.<sup>17</sup> If the Secretary refuses to honor an employee request for an inspection, he must provide an informal hearing and explain his reason.<sup>18</sup> Employees who believe that they have been discharged in retaliation for exercising their rights under the Act may file a complaint with the Secretary, who must bring an action in federal district court if a subsection has been violated.<sup>19</sup> Finally, if the Secretary arbitrarily or capriciously fails to seek injunctive relief in the face of imminent danger of serious physical harm, any injured employee can bring a mandamus action in federal district court to compel him to do so.<sup>20</sup>

The rights of employees at the adjudicatory stage are set forth in § 10(c), the interpretation of which lies at the heart of this appeal. The adjudicatory stage is governed by the Commission, which is an independent body responsible for appointing hearing officers, promulgating rules of procedure to govern hearings, and for reviewing orders of the hearing officers.<sup>21</sup> The Commission also has authority to assess the civil penalties proposed by the Secretary.<sup>22</sup>

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<sup>16</sup> 29 U.S.C. § 657(c).

<sup>17</sup> 29 U.S.C. § 657(f).

<sup>18</sup> *Id.*

<sup>19</sup> 29 U.S.C. § 660(c) (1), (2).

<sup>20</sup> 29 U.S.C. § 662(d).

<sup>21</sup> 29 U.S.C. § 661.

<sup>22</sup> 29 U.S.C. § 666(i).

## A.

The first part of this dispute concerns the interpretation of § 10(c). Section 10 of the Act, 29 U.S.S. § 659, is titled Enforcement Procedures. Subsection (c), the full text of which is set forth in the note,<sup>23</sup> permits an employer to notify the Secretary that he intends to contest a citation. It also permits any employee to contest the period of time fixed in the citation for abatement of the violation. In either event, the Commission must afford "an opportunity for a hearing." Finally, it requires the Commission to provide affected employees or their representatives "an opportunity to participate as parties to hearings under this subsection."

The parties agree that the subsection provides for two kinds of proceedings: one initiated by an employer's filing of a notice of contest, and one commenced by the employees' protest that the period set in the citation for

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<sup>23</sup> (c) If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a) (3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

abatement of the violation is unreasonable.<sup>24</sup> The Secretary parts company with the Union and the Commission, however, on the extent of employee participation in the employer-initiated proceeding. The Secretary contends that employee participation is limited to challenging the reasonableness of the period for abatement of the violation in both kinds of proceedings.<sup>25</sup> The Union and the Commission read the statute to provide for plenary participation by employees in employer-initiated proceedings, but concede, as they must, that employees may not initiate proceedings for the purpose of objecting to anything other than the reasonableness of the abatement.

The circuits are divided on this question. The Second, Third, and Sixth favor the Secretary's position; the District of Columbia has followed the view urged by the Union and adopted by the Commission. In *Marshall and Lcl. 8-901 OCAW v. Sun Petroleum Products Co. and OSHRC*, 622 F.2d 1176, 1185-88 (3d Cir.), *cert. denied*, 449 U.S. 1061 S.Ct. 1061, 66 L.Ed.2d 604 (1980) (*Sun Petroleum*) and *American Cyanamid*, *supra*, 647 F.2d at 388, the Third Circuit read the specific provision conferring on employees the right to challenge reasonableness of the abatement period as limiting the more general directive to the Commission concerning employee

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<sup>24</sup> See, e.g. *Marshall v. Sun Petroleum Products*, 622 F.2d 1176, 1185 (3d Cir.), *cert. denied*, 449 U.S. 1061, 101 S.Ct. 784, 66 L.Ed.2d 604 (1980).

<sup>25</sup> The Secretary has switched positions on this issue during the course of this appeal. In his brief, he conceded that "[i]n the hearing on an employer's contest of a citation, employees who elect party status are *not* limited in the interests they may assert to the length of the abatement period." Petitioner's brief at 28 (emphasis in original). Both at oral argument and in a supplemental brief filed in response to a question from the court on another issue, however, the Secretary maintained that employees' participation is limited in all cases to challenging the abatement period. As our disposition of the issue *infra* demonstrates, the Union has not been prejudiced by this reversal.

participation "as parties." To support its interpretation, the court quoted the Senate Committee Report, which states that § 10(c) "'gives an employee or representative of employees a right, whenever he believes that the period of time provided in a citation is unreasonably long, to challenge the citation on that ground'" 627 F.2d at 1186.<sup>26</sup> In *American Cyanamid*, the Third Circuit further noted that the Act provides other means by which employees can protect their interests. 647 F.2d at 388 (e.g., under § 657(f), employees may initiate the citation process by requesting the Secretary to inspect). Both the Second and Sixth Circuits interpreted § 10(c) in the context of the Act's overall structure. In *Mobil Oil*, *supra*, the Second Circuit described the Act as vesting broad rule-making, investigatory, and enforcement powers in the Secretary, but according employees a specific, narrow role in the enforcement process. 713 F.2d at 926-27.<sup>27</sup> See also *IMC*, *supra*, 635 F.2d 544, 551 (6th Cir. 1980) to the same effect. The Second Circuit reasoned that broader employee participation would inhibit the Secretary's ability expeditiously to effect the Act's

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<sup>26</sup> Quoting Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 at 155 (emphasis added) [hereinafter cited as Legislative History].

<sup>27</sup> Specifically, the Second Circuit listed the following limitations on employee participation under OSHA:

[E]mployees do not have a private right of action. *Marshall v. OSHRC*, *supra*, 635 F.2d at 550-51 (citing *Taylor v. Brighton Corp.*, 616 F.2d 256 (6th Cir. 1980)). They may not compel the Secretary to adopt a particular standard. *OCAW v. OSHRC*, *supra*, 671 F.2d at 649 (citing *National Congress of Hispanic Am. Citizens v. Usery*, 554 F.2d 1196 (D.C.Cir. 1977)). As parties, they may not prosecute a citation once the Secretary decides to withdraw it, *Marshall v. OSHRC*, *supra*; nor may they continue an appeal of a Commission decision once the Secretary unconditionally asserts that he will not prosecute the citation regardless of the decision by the court of appeals, *OCAW v. OSHRC*, *supra*, 671 F.2d at 650-51.

remedial purposes because the Act stays all requirements to abate pending the Commission's final resolution of the proceedings.<sup>28</sup> 713 F.2d at 927.

The District of Columbia offered a different view of § 10(c) in *OCAW v. OSHRC*, 671 F.2d 643 (D.C.Cir. 1982), *cert. denied sub nom., American Cyanamid Co. v. OCAW*, — U.S. —, 103 S.Ct. 206, 74 L.Ed.2d 165 (1983). The court described the subsection as establishing a two-tier scheme: (1) employees may challenge the reasonableness of the abatement period at any time within fifteen days of the citation's issuance, or (2) employees may participate fully as parties *if* the employer contests the citation. *Id.* at 648. "The employees' request for party status," it said, "confers jurisdiction on the commission to entertain the employees' objections on all matters relating to the citation in question." *Id.* See also *Sun Petroleum Products, supra*, 622 F.2d at 188-93 (Pollack, J. dissenting) (same).

The D.C. Circuit read the same legislative history as supporting its contrary interpretation. It read the excerpt relied upon by those other circuits, when placed in context, to suggest that the drafters of the bill envisioned the two-tier approach adopted in *OCAW v. OSHRC*:

If the employer decides to contest a citation or notification, or proposed assessment of penalty, the Secretary must afford an opportunity for a formal hearing under the Administrative Procedure Act. Based upon the hearing record the Secretary shall issue an order confirming, denying, or modifying the citation, notification, or proposed penalty assessment. The procedural rules prescribed by the Secretary for the conduct of such hearings must make provision for affected employees or other representatives to *participate as parties*.

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<sup>28</sup> See 29 U.S.C. § 659(b).

Section 10(c) *also* gives an employee or representative of employees a right, whenever he believes that the period of time provided in a citation for abatement of a violation is unreasonably long, to challenge the citation on that ground. Such challenges must be filed within 15 days of the issuance of the citation and an opportunity for a hearing must be provided in similar fashion to hearings when an employer contests. The employer is to be given an opportunity to participate as a party.

671 F.2d at 648.<sup>29</sup>

We adopt the interpretation of the District of Columbia Circuit. "It is assumed Congress used words as they are commonly used and ordinarily understood." *Quarles v. St. Clair*, 711 F.2d 691 (5th Cir. 1980); *United States v. Porter*, 591 F.2d 1048, 1053 (5th Cir. 1977). The word "parties" usually connotes persons entitled to participate fully in litigation.<sup>30</sup> This view is buttressed by the more complete account of the legislative history quoted by the District of Columbia Circuit, which suggests that Congress contemplated two different applications of the "parties" provision. The ultimate sentence of the § 10(c) instructs the Commission to provide for employee participation "as parties to *hearings under this subsection*." The subsection, as we have seen, plainly envisions two kinds of hearings—employee-initiated and employer-initiated—and it contains no language limiting the employees' participation in the employer-initiated hearings to debate over the reasonableness of the abatement period. Although we have remarked that the "express allowance of one specific objection suggests a statutory intent to

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<sup>29</sup> See Legislative History, *supra* note 26 at 154-55 (emphasis added).

<sup>30</sup> See, e.g., Webster's Third New International Dictionary 1648 ("party" as synonymous with "litigant").



foreclose at least some other objections," *Marshall v. B.W. Harrison Lumber Co.*, 569 F.2d 1303, 1307 (5th Cir. 1978), this aid to interpretation is not a stricture. We find the maximum of *inclusio unius* outweighed in the present case by the legislative history and our view of the Act's general purposes.

We do not disagree with those courts that have described the Act as vesting prosecutorial authority in the Secretary. See, e.g., *Mobil Oil*, 713 F.2d at 927. But focussing solely on the prosecution phase of the process misses the issue in this case. The Union's rights arise at the adjudicatory stage, the administration of which falls within the Commission's bailiwick cf. *Diamond Roofing v. OSHRC*, 528 F.2d 645, 648 n. 8 (5th Cir. 1976). Moreover, we understand Congress to have attempted to erect a comprehensive structure that would allow for meaningful participation of those most personally concerned with workplace safety—the workers. *OCAW v. OSHRC*, *supra*, 671 F.2d at 648. It is consistent with such a balanced scheme to limit the scope of employee participation at the investigatory and citation stages of the process, yet to provide plenary participation at the adjudicatory stage. Identification of violations of workplace safety standards is peculiarly within the expertise of the Secretary, hence greater deference is in order at that phase. Reliance on the Secretary's expertise becomes less important, however, once he has determined that the employer has violated the standards and has proposed a penalty.

The Secretary argues that such a scheme would produce the "anomalous" result of according greater rights to the employees in proceedings initiated by the employer than those initiated by the employees. This is the result but it is not irrational. It illustrates the fine balance struck by Congress. The Act requires the Secretary to issue a citation once he has determined that a violation exists.<sup>31</sup>

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<sup>31</sup> The Act provides that if the Secretary believes an employer has violated the Act or any standard promulgated under it, "he shall



It assumes that the Secretary will issue a citation in the appropriate circumstances and it provides a mechanism to check his arbitrary failure to do so when the consequences are sufficiently serious.<sup>32</sup> Unless the citation is to be litigated, the Act confines the employees to challenging the one aspect of the citation of most immediate concern to them—how soon it will provide relief. If, however, the employer disputes the citation, the employees are provided an opportunity to have an equal voice in proceedings that might result in the modification or revocation of the citation.

Finally, we observe that the Commission has adopted the interpretation advocated by the Union.<sup>33</sup> We have said before that “[t]he Commission’s interpretation of OSHA’s provisions are entitled to deference where they are reasonable and consistent with the Act’s purposes.” *Central Georgia R.R. Co. v. OSHRC*, 576 F.2d 620, 624 (5th Cir. 1978).<sup>34</sup> More recently, however, we have qualified the truism that courts defer to agency interpretation by listing several factors that control the degree of that deference. *Quarles v. St. Clair*, 711 F.2d at 706-07. “These include: the consistency of the interpretation and the length of adherence to it, undisturbed by Congress; the explicitness of the congressional grant of authority to

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with reasonable promptness issue a citation to the employer” 29 U.S.C. § 658(a) (emphasis added).

<sup>32</sup> See *supra* note 20 and accompanying text.

<sup>33</sup> See *Mobil Oil Corp.* 1982 OSHD [CCH] ¶ 26,187 at p. 33,019, *rev’d sub nom. Donovan and Mobil Oil Corp. v. OSHRC and PTEU*, 713 F.2d 918 (2d Cir. 1983).

<sup>34</sup> See also *Marshall v. Kantson Construction Co.*, 566 F.2d 596, 600 (8th Cir. 1977); *Diamond Roofing v. OSHRC*, 528 F.2d 645, 648 n. 8 (5th Cir. 1976). Cf. *Florida Power & Light Co. v. FERC*, 660 F.2d 668 (5th Cir. 1981), *cert. denied sub nom., Fort Pierce Utilities Auth. v. FERC*, — U.S. —, 103 S.Ct. 800, 74 L.Ed.2d 1003 (1983); *Ford Motor Credit v. Milhollin*, 444 U.S. 555, 556, 100 S.Ct. 790, 792, 63 L.Ed.2d 22, 25 (1983).

the agency with greater deference in cases of more specific delegation; and the degree of agency expertise necessarily drawn upon in reaching its interpretation." *Id.*

Application of these factors to the present case yields a muddled picture. The Commission recently has reversed its position on its interpretation of § 10(c). *See Mobil Oil supra* at 33,028. On the other hand, Congress explicitly charged the Commission with responsibility for governing the procedures employed at the hearings. 29 U.S.C. § 659(c). But the question before us calls for little knowledge of workplace safety and, therefore, depends less heavily upon Commission expertise for its resolution. We conclude that the Commission's adoption of the Union's interpretation provides persuasive, but not controlling authority.

Balancing these considerations, we conclude that § 10(c) gives employees the right to participate as parties to employer-initiated proceedings. Because the Commission has not prescribed rules specifically governing the extent of this participation,<sup>25</sup> we are directed by § 12(g) of the Act, 29 U.S.C. § 661, to look to the Federal Rules of Civil Procedure. The applicable rule is Rule 24(a), which covers intervention. An intervenor of right under Rule 24(a) "is treated as if he were an original party and has equal standing with the original parties." C. Wright & A. Miller, *Federal Practice and Procedure* § 1920 at 611 (1972). *Cf. Gilbert v. Johnson*, 601 F.2d 761, 768 (5th Cir. 1979) (Rubin, J., concurring), *cert. denied sub nom. Gilbert v. Cleland*, 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed. 2d 236 (1980). Thus, employees who elect to participate as parties after the employer files its notice of contest are entitled "to litigate fully" the merits of the citation and hence the terms of the settlement agreement. *See C. Wright and A. Miller, supra* at 612.

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<sup>25</sup> *See Mobil Oil Corp., supra* at 33,026.

## B.

The final, and in this case dispositive, question is whether the employer's withdrawal of its notice of contest stripped the Union of its standing to challenge, and consequently divested the Commission of jurisdiction to review, the substance of the settlement agreement. The Secretary argues that, even under the D.C. Circuit's interpretation, the employees' rights are yoked to the status of the employer's participation: even if the notice of contest opens the door to plenary employee participation, once the employer withdraws its notice the door is slammed shut and the employees are relegated to challenging the reasonableness of the abatement period only.

Were we writing on a clean slate, we would be inclined to uphold the Union and Commission position, and to rule that an employee may seek review of the terms of a settlement agreement notwithstanding the employer's withdrawal of its notice of contest. Because the Commission has not promulgated rules concerning the employer's withdrawal of notice,<sup>36</sup> our analysis of §§ 10(c) and 12(g) leads us to this result.

The employee is in a position analogous to an intervenor in a civil lawsuit in which the original parties have settled or sought dismissal. The Secretary argues that, because an intervenor must have an independent jurisdictional basis for continuing the cause of action, apart from its status as intervenor after the original parties have resolved their dispute, the employees' action here must fail because the Act allows them independently to invoke the Commission's jurisdiction only to challenge the abatement period. Wright and Miller, however, describe the caselaw on when and whether an intervenor's claim can proceed to decision after dismissal of the original action as "scanty and unsatisfactory." C. Wright & A. Miller,

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<sup>36</sup> *Id.*

*supra*, at 613. The Third Circuit has observed that "[t]he weight of authority in the United States Courts of Appeals supports the principle that an intervenor can continue to litigate after dismissal of the party who originated the action. *U.S. Steel v. EPA*, 614 F.2d 843, 845 (3d Cir. 1979), citing *Magdoff v. Saphin Television & Appliance, Inc.*, 228 F.2d 214 (5th Cir. 1955) and *Hunt Tool Co. v. Moore, Inc.*, 212 F.2d 685 (5th Cir. 1955).

In *U.S. Steel*, intervenor Scott Paper filed its motion to intervene in a petition for review of an EPA action well past the 60-day time limit (which the court seemed to regard as jurisdictional) for petitions to seek judicial review had expired. The original petitioner, U.S. Steel, however, had filed in time; hence Scott had filed its motion while the court had jurisdiction. Soon thereafter, U.S. Steel moved to dismiss its petition for review and EPA opposed Scott's continuation of the action. Because Scott filed its motion while the court had jurisdiction (it thus had not attempted to cure a jurisdictional defect by intervention), and because the intervention clearly was an effort to protect Scott's interests—which were similar but not identical to U.S. Steel's—the court upheld its right to continue the action.

Relying on *Ruotolo v. Ruotolo*, 572 F.2d 336 (1st Cir. 1978), the Secretary argues that an intervenor requires an independent jurisdictional basis for continuing the cause of action. In that case, the United States sought to appeal a district court's decision to allow a retired referee in bankruptcy, one Poulos, and his law firm to represent the Debtor in Possession in a Chapter XI proceeding. The creditor had withdrawn its motion objecting to Poulos's representation, and Poulos himself had withdrawn from any participation in the proceedings. The First Circuit ruled that the case failed to meet the case or controversy requirement of art. III, section 2 of the U.S. Constitution. Although the court did say that the case would be justi-

cialable only if the United States had standing to participate in the case in its own right apart from the creditor's motion, the court's subsequent analysis distinguishes that opinion from the present case. The court reasoned that, because the United States had no stake in the bankruptcy and sought to challenge only the legal issue of the retiree's participation while receiving retirement benefits, to allow the appeal would render the outcome an advisory opinion. *Id.* at 338.

In the present case, by contrast, the employees do have a stake in the terms of the settlement agreement; they are not seeking an advisory opinion from the Commission. Furthermore, under our view of § 10(c), the statute itself makes the employees full parties to the proceeding to enable them to protect their interests. Moreover, it would be inconsistent with that view to permit the employer to reach an *ex parte* agreement with the Secretary. Therefore, we regard the present case as more like *U.S. Steel*.<sup>87</sup>

The statutory language is susceptible of either construction, and either result can be viewed as part of a coherent statutory scheme. The Secretary's interpretation, even after taking into account our ruling in the previous section, is logical if § 10(c) is regarded as granting conditional intervenor status to the employees, the condition being the continued participation of the employer. *Cf.* *C. Wright & A. Miller, supra*, at 611 (discussing conditional intervention). Such status makes sense if the employees' role is viewed, as the Secretary has suggested it ought to be, as that of a "gadfly." *Cf. NLRB v. OCAW*, 476 F.2d 1031, 1036 (1st Cir. 1973). The interpretation

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<sup>87</sup> Here, as in *U.S. Steel*, the intervenor could not have joined the action had the original party not invoked the tribunal's jurisdiction, but the Secretary does not contend, nor could he, that the Union's election of party status was an attempt to cure a jurisdictional defect. At that time, the employer had not yet withdrawn its notice of contest; the Commission, therefore, had jurisdiction to hear the employee's objections under our ruling in Part III.B., *supra*.

that we are inclined to favor also appears sound if § 10 (c) is regarded as designed to accommodate the employees' legitimate interest in ensuring workplace safety. By conditioning their full participation on the employer's filing of a notice of contest, the Act can be seen as striking a balance between expeditious prosecution of citations (allowing uncontested ones to become final and limiting the employees' participation to challenging the abatement period only) and the employees' protection of their interests when it becomes more important to do so fully by providing them an equal voice once the employer has contested the citation, and by preventing the employer and the Secretary from concluding an agreement prejudicial to the employees' interests without their participation.

Although, as we have observed above, we traditionally defer to an agency's construction of the statute that it is charged to administer, we will decline to do so in the face of compelling reasons to the contrary.<sup>22</sup> As our foregoing discussion indicates, we believe that the Commission's interpretation, here advocated by the Union, is reasonable and consistent with a coherent view of the statute.

Nevertheless, we feel constrained to adopt the Secretary's interpretation because we find a compelling reason to do so in the unanimity of the authorities behind the Secretary's position. The decisions of the Second, Third, and Sixth Circuits limiting employee participation to challenges to the abatement period in all cases *a fortiori* do not permit full employee participation once the employer has withdrawn its notice of contest pursuant to a settlement. And the D.C. Circuit, in a dictum, has agreed expressly with the Secretary. *OCAW v. OSHRC*, 671 F.2d at 650 n. 7. The Second Circuit, discussing this very issue in *Mobil Oil*, summed up the arguments supporting its position: "Continuation of the commission's proceedings after an employer had agreed to withdraw his notice

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<sup>22</sup> *Florida Power & Light Co. v. FERC*, *supra*, 660 F.2d 668, 679.

of contest so that an employees' representative or an employee may present objections to a settlement agreement not only puts off the day when abatement should finally occur, but also prevents the Secretary from taking any steps to compel abatement. . . . Moreover, employers would only be discouraged from entering settlement negotiations with the Secretary if they knew further proceedings before the commission could be required." 713 F.2d at 927. Thus, in the Second Circuit's view, the Union's position would produce an unworkable result: the Secretary would be unduly hampered in his ability to enforce the Act. That this is no small consideration is evidenced by the Secretary's assertion that roughly nine out of every ten cases are settled prior to a hearing. Petitioner's Supplement Brief at 2.<sup>39</sup>

In an administrative territory as vast as is OSHA, the need for uniformity is apparent. Were we to march to the beat of our own drummer, a gross disparity would arise between the Secretary's ability to settle cases in this circuit and his ability to do so elsewhere. Therefore, rather than profess telepathy from the collective mind of the 1970 Congress, we acknowledge that the Act can reasonably be interpreted more than one way, and we adopt a course that at least will not precipitate administrative chaos.

For the above reasons, we hold that employees may participate fully as parties once the employer has filed a notice of contest, and hence are not limited to challenging the reasonableness of the abatement period at such a proceeding. If the employer subsequently withdraws its notice of contest, however, the employees are limited to

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<sup>39</sup> We do not disagree with the Second Circuit that the Secretary might find settlement less easily achieved under the Union's interpretation. Rather, our perspective on the Act recognizes a statutory purpose to accord the employees a greater role at the adjudicatory stage (marked by the employer's notice of contest) and thus to balance competing interests.



challenging the abatement period;<sup>40</sup> and the Commission loses jurisdiction to entertain the employees' petition for review of the settlement agreement's terms. For the foregoing reasons, the order of the Commission denying the Secretary's motion to vacate the review order is VACATED, and the case REMANDED for the Commission to dismiss the petition.

E. GRADY JOLLY, Circuit Judge, concurring in part and dissenting in part:

I concur in the result.

I agree with Part II that the order appealed from is reviewable.

I disagree with and dissent from the conclusion of Part III A that the union in this case may challenge the citation on grounds other than the reasonable length of the abatement. The Second Circuit's reasoning in *Donovan v. OSHRC*, 713 F.2d 918 (2d Cir. 1983) is sounder, more persuasive and truer to the statutory scheme than the majority opinion here. Furthermore, it is wholly unnecessary to discuss or reach the issue here since it is not determinative of the outcome of the case. Whether, therefore, Part III A is dicta is a matter over which parties and courts may later argue.

Finally, I agree with the result reached in Part III B but not in its belief that the more plausible view of the issue there presented is that a union may seek review of the terms of a settlement agreement notwithstanding the employer's withdrawal of the notice of contest.

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<sup>40</sup> We note but do not decide, that this holding may raise issues of timeliness under § 10(a) and (b) if the employer withdraws its notice of contest after the time period for filing employee-initiated contests has expired. The Third Circuit has said that the employer's notice tolls the time period. *Sun Products supra* 622 F.2d 1176, 1185-86.

25a

APPENDIX B

OCCUPATIONAL SAFETY AND  
HEALTH REVIEW COMMISSION

1825 K Street, NW

Washington, D.C. 20006

March 25, 1983

OSHRC Docket No. 79-6847 and 80-1671

IN REFERENCE TO SECRETARY OF LABOR

v.

AMERICAN PETROFINA COMPANY OF TEXAS

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

Harold J. Engel, Esq.  
Counsel for Regional Trial Litigation  
Office of the Solicitor, USDOL  
200 Constitution Ave., NW—Rm. S4004  
Washington, D.C. 20210

James E. White  
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Bennett W. Cervin, Esq.  
Thompson & Knight  
2300 Republic National Bank Building  
Dallas, Texas 75201

Dan C. Edwards, Director  
Health and Safety Department  
OCAWIU  
Box 2812  
Denver, CO. 80201

Stanley M. Schwartz  
Judge, OSHRC  
Room 7B11, Federal Building  
1100 Commerce Street  
Dallas, Texas 75242

OF ORDER

To wit: The Authorized Employee Representative's Request for Extension of Time to File Brief until March 20, 1983, is Granted.

The Secretary's and Respondent's Motions to Vacate the Commission's Direction for Review are Denied.

The Secretary's Motion for Stay of Proceedings Pending Completion of Appellate Review is Denied.

FOR THE COMMISSION

/s/ Ray H. Darling, Jr.  
RAY H. DARLING, JR.  
Executive Secretary

APPENDIX C

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND  
HEALTH REVIEW COMMISSION

OSHRC Docket No. 80-1671

SECRETARY OF LABOR,  
*Complainant,*

v.

AMERICAN PETROFINA COMPANY OF TEXAS,  
*Respondent.*

OIL, CHEMICAL AND ATOMIC WORKERS  
INTERNATIONAL UNION AND ITS LOCAL 4-23,  
*Authorized Employee  
Representative.*

DIRECTION FOR REVIEW

The petition for discretionary review filed by the Authorized Employee Representative is GRANTED under 29 U.S.C. § 661(i) and Commission Rule 92(a), 29 C.F.R. § 2200.92(a). Review is directed on all issues raised by the petition including the following:

1. Whether the judge failed to provide the Authorized Employee Representative an adequate opportunity to be heard on the proposed settlement agreement.
2. Whether the judge erred in approving the settlement agreement as consistent with the provisions and objectives of the Act without a factual inquiry into the Authorized Employee Representative's claims that:

28a

- a. the Respondent had failed to abate the cited conditions involving employee exposure to asbestos, until the work involved was completed, and
- b. the Respondent had failed to correct similar conditions at the same refinery up to the time of the hearing.

/s/ Bertram Roberts Cottine  
BERTRAM ROBERT COTTINE  
Commissioner

Dated: 11 May 1981

APPENDIX D

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND  
HEALTH REVIEW COMMISSION

OSHRC Docket No. 79-6847

SECRETARY OF LABOR,  
*Complainant,*

v.

AMERICAN PETROFINA COMPANY OF TEXAS,  
*Respondent.*

OIL, CHEMICAL AND ATOMIC WORKERS  
INTERNATIONAL UNION AND ITS LOCAL 4-23,  
*Authorized Employee  
Representative.*

DIRECTION FOR REVIEW

The petition for discretionary review filed by the authorized employee representative is GRANTED IN PART under 29 U.S.C. 661(i) and Commission Rule 92(a), 29 C.F.R. § 2200.92(a). Review is limited under this direction for review to the following issues:

1. Whether the judge erred in approving the settlement agreement filed by the Secretary and the Respondent without granting the authorized employee representative's request for "other appropriate relief" under section 10(c) of the Act, 29 U.S.C. § 654(c), in the form of an order directing the Respondent to comply with all provisions of 29 C.F.R. § 1910.1001 at all locations in its Port Arthur refinery.

2. Whether the judge erred in failing to find that the Respondent's notice of contest was not filed in good faith within the meaning of section 10(b) of the Act, 29 U.S.C. § 659(b).

/s/ Bertram Robert Cottine  
BERTRAM ROBERT COTTINE  
Commissioner

Dated: 21 August 1981



APPENDIX E

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND  
HEALTH REVIEW COMMISSION

OSHRC Docket No. 80-1671

SECRETARY OF LABOR,  
*Complainant,*  
v.

AMERICAN PETROFINA COMPANY OF TEXAS,  
*Respondent.*

OIL, CHEMICAL AND ATOMIC WORKERS  
INTERNATIONAL UNION AND ITS LOCAL 4-23,  
*Authorized Employee  
Representative.*

APPEARANCES:

BOBBIE J. GANNAWAY, Esquire, U.S. Department  
of Labor, Office of the Solicitor, 555 Griffin Square  
Building, Dallas, Texas  
For the Complainant

BENNETT W. CERVIN, Esquire, Thompson and  
Knight, 2300 Republic National Bank Building, Dal-  
las, Texas  
For the Respondent

STEVEN WODKA, Esquire, Oil, Chemical and  
Atomic Workers International Union, 1120 19th  
Street, N.W., Washington, D.C.  
For the Employees

DECISION

Between November 6 and November 21, 1979, a repre-  
sentative of the Occupational Safety and Health Admin-

istration (OSHA) inspected a portion of respondent's refinery in Port Arthur, Texas. On March 3, 1980, OSHA issued two citations and notifications of penalty as a result of the inspection. Citation 1 alleges that respondent violated an occupational safety and health standard promulgated by complainant under the provisions of section 5(a)(2) of the Occupational Safety and Health Act of 1970, 29 USC 651 *et seq.*, (hereinafter the "Act"), that this violation is other than serious in nature and proposes no penalty. Citation 2, items 1a through 1d, allege that respondent violated four standards, and that the alleged violations are serious in nature. A \$900.00 penalty is proposed for these alleged violations. Both of the citations required immediate abatement of the violations.

Respondent duly contested the issuance of the citations, the proposed abatement dates, and the proposed penalty. In due course the authorized employee representative (the "union") elected and was granted party status under Rule 20 of the Commission's Rules of Procedure.

Settlement discussions ensued between the parties, and on November 13, 1980, complainant and respondent executed exhibit R-1, a settlement agreement which purportedly disposes of all the issues in question. The union did not agree with the terms of the settlement and did not execute the settlement. The union's objections were heard on November 14, 1980, and the parties have filed post-hearing briefs.

Rule 100 of the Rules of Procedure states, in section (a) thereof, that a settlement proposal shall be approved when it is consistent with the provisions and objectives of the Act. Section (b) provides that every settlement proposal submitted for approval shall include, where applicable:

- (1) A motion to amend or withdraw a citation, notification of proposed penalty, notice of contest, or petition for modification of abatement;

(2) A statement that payment of the penalty has been tendered or a statement of a promise to pay; and

(3) A statement that the cited condition has been abated or a statement of the date by which abatement will be accomplished.

Complainant and respondent contend that the settlement agreement complies with the requirements of Rule 100 and, consequently, should be approved. The union contends that the settlement should not be approved, since it is not consistent with the provisions and objectives of the Act. Complainant and respondent counter by stating that the union has standing to object to the settlement only as to abatement provisions and that, as stated in the settlement and agreed to by the parties, the alleged violations have been abated. Accordingly, the union has no standing to object to the provisions of the settlement agreement.

In the settlement agreement complainant withdraws items 1a and 1b of citation 1. It is apparent from the recitation of the standards involved in these items and from the comments of the parties at the hearing that the reference to citation 1 is a typographical error, and that complainant is actually withdrawing items 1a and 1b of citation 2. Complainant also amends the characterization of items 1c and 1d of citation 2 from serious to non-serious violations. Complainant also reduces the proposed total penalty from \$900.00 to no penalty. Respondent withdraws its notice of contest and represents that the alleged violations have been abated. Respondent agrees that the citations, as amended, shall become a final order of the Commission.

It can be seen that the settlement contains, where applicable, motions to amend and withdraw items of citation 2, notifications of proposed penalty, and notice of contest. Since no penalty is proposed in the amended

citations it is obviously not necessary that the settlement contain a statement that payment of the penalty has been tendered or a statement of a promise to pay the penalty. The settlement does contain a statement that the cited conditions have been abated. All of the requirements which are applicable as set forth in Rule 100(b) have been met. Approval of the settlement then depends only on whether or not it is consistent with the provisions and objectives of the Act.

Section 2(b) of the Act stated that its purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." In order to attain these objectives the Act, in various sections, authorizes promulgation of occupational safety and health standards, inspection and investigation of workplaces, issuance of citations for alleged violations of the Act or standards, and determination by the Commission in the event of a contest of a citation or notification of penalty.

Section (10) (a) of the Act authorizes an employer to "contest the citation or proposed assessment of penalty." Section (10) (c) authorizes an employee or representative of employees to file a notice with the Secretary "alleging that the period of time fixed in the citation for abatement of the violation is unreasonable." The contest under Section (10) (a) and the employee notification under section (10) (c) must be filed within 15 working days of the issuance of a citation. In either event the Commission shall afford an opportunity for a hearing. Section (10) (c) also states that the Commission's Rules of Procedure shall provide affected employees or representatives thereof an opportunity to participate as parties to any such hearings. Accordingly, Rule 20(a) of the Commission's Rules of Procedure provides for election by affected employees to participate as parties at any time before the commencement of the hearing, or at a later time for a good cause shown.

It is immediately apparent from the recitation of the above sections of the Act that, whereas the employer can contest the citation or proposed assessment of penalty, the employee or employee representative's basis for contest is restricted to an allegation that the period of time fixed for abatement of the violation is unreasonable. Viewed in this light the union here has no standing to object to the provisions of the settlement. The citations called for immediate abatement. The settlement states that the violative conditions have been abated, and the parties all agreed at the hearing that since the job in question has been completed, the conditions have been abated. Since there is no abatement question, the union has no standing to object to the settlement. Complainant and respondent have agreed on the terms of the settlement, the union has no standing to object thereto and, consequently, it should be approved.

Another question to be determined is whether or not the union has had an opportunity for meaningful participation in the settlement process. An authorized employee representative that has elected party status must be afforded an opportunity for meaningful participation in any settlement. It must either agree to the settlement or be afforded an opportunity to participate in the settlement negotiations. *ASARCO, Inc.*, — OSAHRC —, 8 BNA OSHC 2200, 1980 CCH OSHD ¶ 24,913 (No. 79-5557, 1980). The union did not agree to the settlement, but the record does reflect meaningful participation by the union in settlement negotiations. As stated by counsel for complainant and tacitly agreed to by the union's representative, ongoing discussions were held at great length with the union representative, and a conference meeting was held between all parties at which settlement matters were discussed in detail. Complainant's representative listened very carefully and gave serious consideration to the views and arguments of the union representative before entering into the settlement agreement.

over his objections. This certainly indicates meaningful participation by the union in the settlement process and fulfills the requirement set forth in *ASARCO*.

The last matter to be determined is whether or not the settlement is consistent with the provisions and objectives of the Act, as required by Rule 100(a). The principal purpose of the Act is to obtain a safe and healthful workplace for employees through effectuation of the procedures and enforcement provided in the Act. Approval of the settlement herein will constitute a finding and a final order that respondent has violated the Act as alleged in the particular items in question. Abatement of the violative conditions has occurred. Although no monetary penalty is assessed, respondent has been penalized in the sense that another such violation in the future can result in citations for repeated or willful violations. This certainly provides an incentive for respondent to make every effort to comply with the Act in the future, as recognized by respondent in the settlement agreement. On balance the agreement is consistent with the provisions and objections of the Act as required by Rule 100(a) and should be approved.

Since the authorized employee representative has had an opportunity to meaningfully participate in the settlement process, and since the settlement meets all of the criteria specified in Rule 100 of the Rules of Procedure it should be and is hereby approved.

/s/ F. Daley Abels  
F. DALEY ABELS  
Judge, OSHRC

Dated: April 9, 1981

APPENDIX F

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND  
HEALTH REVIEW COMMISSION

OSHRC Docket No. 79-6847

SECRETARY OF LABOR,  
*Complainant,*  
v.

AMERICAN PETROFINA COMPANY OF TEXAS,  
*Respondent.*

OIL, CHEMICAL AND ATOMIC WORKERS  
INTERNATIONAL UNION AND ITS LOCAL 4-23,  
*Authorized Employee  
Representative.*

Appearances:

E. Justin Pennington, Esq.  
Dallas, Texas  
For the Complainant.

Bennett W. Cervin, Esq.  
Kris L. Terry, Esq.  
Dallas, Texas  
For the Respondent.

Mr. Steve Wodka  
Washington, D.C.  
For the Union.

DECISION AND ORDER

SCHWARTZ, Judge:

This matter involves the question of whether a proposed settlement agreement between the Secretary of



Labor and American Petrofina Company should be approved. The Oil, Chemical, and Atomic Worker's International Union, hereinafter "the Union" objects to specific provisions of the agreement. The facts are undisputed.

On January 15, 1981, the Secretary and Respondent filed the subject settlement agreement and a joint motion to affirm. They indicated the Union, which had elected party status, declined to participate in the agreement. Next, the Union filed two objections. It objected to the proposed reduction of items 9(a), 9(b), and 9(c) of the agreement from a serious violation to a non-serious violation. The Union also contended that abatement of the conditions listed in terms 9(a), 9(b) and 9(c) had not occurred in the true and real sense of the word.

The undersigned scheduled a limited evidentiary hearing on these objections. Subsequently the Union filed a discovery request and a motion to compel discovery. By order dated March 6, 1981, I denied the discovery of any documents concerning the proposed reduction of the classification of the violation. A prehearing conference was conducted by telephone to discuss my March 6, 1981 order and the scope of the evidentiary hearing. I ruled that the Union could present testimony on the issue of abatement of the subject items. I indicated that an offer of proof would be accepted on the classification of the violations since I had ruled the Union lacked standing, as a matter of law, to object on that basis.

The items of the citation, in issue provide as follows:

9(a)

29 CFR 1910.1001(f)(1): Initial monitoring was not conducted in such a manner to determine whether every employee's exposure to airborne asbestos fibers is below the prescribed limits:

(a) in the FCCU, no monitoring was conducted for employees who were removing asbestos insulation or for employees who were working in the areas

where asbestos was being removed or was laying about the workplace loose.

9(b)

29 CFR 1910.1001(f)(2)(i): Proper samples were not collected from the breathing zones of employees when determining exposure to airborne asbestos fibers:

(a) in the FCCU no monitoring was conducted to determine exposure to employees removing asbestos insulation or to employees working in those areas where asbestos was in evidence.

9(c)

29 CFR 1910.1001(f)(3)(i): Samples were not collected from areas of a work environment which were representative of the airborne concentrations of asbestos fibers which may reach the breathing zone of employees:

(a) in the FCCU, no monitoring was conducted for employees who were removing asbestos insulation or for employees who were working in the areas where asbestos was being removed or was laying about the workplace loose.

The hearing was held on March 20, 1981, in Port Arthur, Texas. The Union's offer of proof was tendered and accepted. The parties were then given the opportunity to present evidence and argument concerning whether items 9(a), 9(b) and 9(c) had been abated as set forth in the settlement agreement dated November 13, 1980.

The hearing established that American Petrofina undertook a large construction project including the FCCU area at its Port Arthur Refinery during the summer of 1979. It hired a prime contractor to supervise the construction work some of which was in turn subcontracted

out. OSHA inspected the worksite in the fall of 1979. Respondent was cited for a number of items including items 9(a), 9(b), and 9(c) which related to monitoring for asbestos. The Union presented Mr. John Michael Breaux who testified Respondent has conducted asbestos removal operations since the settlement agreement was executed in November 1980. He referred to a job concerning the VB unit of the refinery. Respondent acknowledged at the hearing and in its brief that other construction projects may and likely will be carried out at the refinery in the future as technological needs demand, utilizing contractors and subcontractors it cannot now identify.

### OPINION

#### *Sun Petroleum Products Co.*

Complainant and the Respondent both argue that the Commission has the jurisdiction to review a settlement agreement only for the limited purpose of entertaining objections from the employee or employee's representative that the abatement period proposed by the settlement is unreasonable. They rely on the decision of the United States Court of Appeals for the Third Circuit in *Marshall v. Sun Petroleum Products Co. and OSHRC*, Docket Nos. 79-1822 and 79-1828 (3rd Cir. May 29, 1980), 622 F.2d 1176. This position must be rejected. The Commission has respectfully declined to follow the holding in *Sun Petroleum*. See *Farmers Export Company*, 80 OSAHRC —, 8 BNA OSHC 1655, 1980 CCH OSHD ¶ 24,569 (No. 78-1708, 1980).

### CLASSIFICATION OF THE VIOLATION

Complainant and Respondent have agreed to reduce items 9(a), 9(b), and 9(c) from serious to non-serious. The Union disagrees with the reduction and desires to litigate this issue independent of the Secretary. It believes a serious violation exists and that the reduction

fails to promote future compliance or abatement of the violation.

The undersigned believes that the classification of a violation is essentially subjective in nature. It comes within the prosecutorial discretion placed in the Secretary under the provisions of the Act. He has evaluated the facts and circumstances of this case and determined that a non-serious violation is appropriate. In my view, he has served the public interest, employees included, by insuring that a final order may be entered as to a non-serious violation. Respondent must abate the violations and the Secretary's reinspection rights are clearly spelled out in the agreement.

I find that this case does not warrant separate prosecution by affected employees. This procedure may be appropriate in a case where the Secretary withdraws a citation and abatement is not required. These facts may lead to rejection of a settlement agreement and continuance of the prosecution by employees. The Secretary and employees may have separate interests to be served. However, the reduction from serious to non-serious cannot be said to be contrary to the statutory purpose of assuring a safe and healthful work place. This purpose is best served, as here, by a prompt voluntary disposition of the case resulting in a final order of the Commission.

#### ABATEMENT

The Union has called into question whether abatement of items 9(a), 9(b), and 9(c) has occurred. It argues that contrary to the representations in the settlement agreement abatement has not occurred. I therefore must determine whether abatement of items 9(a), 9(b), and 9(c) has occurred. *American Cyanamid Co.*, 80 OSAHRC — 8 BNA OSHC 1346, 1980 CCH OSHD ¶ 24,424 (No. 77-3752, 1980) *Pet. for Review Filed*, No. 80-1942 (3rd Cir. June 26, 1980).

The Union acknowledges that the overhaul of the FCCU was completed by December 1979 (Union brief p. 4). It argues that the Commission should reject the settlement agreement as written and enter an order directing the employer to abate by adhering to all the provisions of 29 C.F.R. 1910.1001 at all locations in the Port Arthur refinery when asbestos insulation is removed. It argues that Respondent has not taken any positive steps to abate the hazard but merely contested the Complainant's citation and calculated that the overhaul project would be completed long before a hearing was held or the case was settled.

Respondent contends that specific abatement of the violation has occurred. The project has been completed and thus the particular conditions and practices set forth in items 9(a) (b) and (c) have ceased to exist. It argues that the Union's theory of requiring the company to institute a plant wide program to insure that the violations will not occur in the future on a different construction project at the same site is both unworkable and outside the scope of the Act.

I find that Respondent has abated the conditions cited in items 9(a), 9(b), and 9(c) as represented in the settlement agreement. Completion of the construction activity which gave rise to the violations constituted abatement for purposes of the Act. My reasons follow:

The purpose of the subject citation is to achieve correction of the conditions set forth therein. The Secretary's Field Operations Manual (FOM) recognizes that conditions change rapidly on a construction site and provides for short abatement times. The project involved here is analogous to construction work which has a beginning and an ending of the operation. The overhaul of the FCCU was completed in December 1979. The FOM also distinguishes between Repeat and Failure to Correct situations by providing as follows:

Repeated violations are also to be distinguished from a failure to correct. If upon inspection, a violation does not involve the same piece of equipment or the same location within an establishment or work site, the violation may be a repeated one (FOM Chp. VIII B4(C)).

These guidelines do not have the full force and effect of law. However they are reasonable and distinguish between two separate and distinct enforcement problems. The Union's suggested policy of requiring plant wide abatement would essentially negate the Repeat violation provisions of the Act. The failure to correct violations would erode the Repeat violations, where as here, a particular construction project or area of work has been completed. The logical extension would be that an employer who received a housekeeping violation on the first floor of a high rise building project would be subject to a failure to correct citation for a similar violation on the thirtieth floor of the project.

The undersigned Judge believes that the Commission intended its role to be a limited one when considering settlement agreements. The determination of whether abatement has occurred is essentially factual. It is well defined concerning whether a guard has been placed on a machine. Where as here, the Respondent has completed the specific work the Commission must consider this as abatement of the subject conditions. It then becomes a matter of enforcement policy for the Secretary of Labor to ensure that any future violations are pursued through the provisions of the Act. These include the issuance of a Willful citation, Repeat citation, higher penalties, and/or possible criminal prosecution of the Respondent for future non-compliance with these particular standards. The undersigned does not feel that Congress intended the Commission to circumvent these provisions by the rejection of settlement agreements and the requirement of plant wide and/or construction site

wide abatement orders under circumstances as presented in this case.

I have noted Respondent's position that it has purposefully chosen not to go into the merits of this settled case. It has chosen not to present evidence as to the specific measures it has taken both before and after the inspection to assure compliance with applicable asbestos standards. Rather, it has relied and prevailed on the fact that the construction work in question was completely finished.

The undersigned Judge has also considered the Union's belief that this case does not lend itself to even the possibility of control under normal OSHA enforcement procedures. Mr. Wodka has presented clearly the Union's position and obvious concern in this case. However, I disagree with him on this point.

The Secretary has stated that the agreement should be affirmed as a final order of the Commission so that all the parties can proceed in manners authorized in the Act. I agree. However it is extremely important that the Secretary follow through on a case such as this. Once the citation becomes a final order of the Commission this case should be flagged by both the Area Director and the Regional Solicitor. The Union should and, I am sure will, continue to closely monitor this situation. The complaint procedures of the Act are tailor made for a case such as this. The Secretary, upon receipt of a complaint can make an expedited inspection and determine whether a citation should be issued. He can then determine the nature of the prosecution, if any, to conduct. Respondent recognizes that these procedures, (complaint) can be used and has reserved putting on evidence at the time. In addition an expedited hearing can be conducted by the Commission.

The Union considers this piecemeal non-effective enforcement of the OSHA asbestos standard. However I



find the enforcement scheme best protects due process of all the parties. It is a system of checks and balances and participation by all parties to achieve safety in the workplace. The provisions concerning Willful, Repeat, and criminal penalties should be utilized to deter future violations of the same standards as intended by Congress. Rejection of the settlement agreement in this case would not achieve the goals of the Act and would be contrary to the statutory scheme set forth for enforcement of the Act and its regulations.

Consequently, the reasons stated above, the settlement agreement is approved. The objections of the Union are overruled.

/s/ Stanley M. Schwartz  
STANLEY M. SCHWARTZ  
Administrative Law Judge

Dated: July 22, 1981



## APPENDIX G

## STATUTES AND REGULATIONS INVOLVED

1. Section 9(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 658, provides as follows:

(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 654 of this title, of any standard, rule or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

\* \* \* \*

2. Section 10(a), (c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659, provides as follows:

(a) If, after an inspection or investigation, the Secretary issues a citation under section 658(a) of this title, he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 666 of this title and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the

employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by an employee or representative of employees under subsection (c) of this section within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

\* \* \* \*

(c) If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a) (3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an

opportunity to participate as parties to hearings under this subsection.

4. Sections 12(a), (b), (g), (j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 661(a), (b), (f), (i), provide as follows:

(a) The Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this Chapter. The President shall designate one of the members of the Commission to serve as Chairman.

\* \* \* \*

(b) The terms of members of the Commission shall be six years except that (1) the members of the Commission first taking office shall serve, as designated by the President at the time of appointment, one for a term of two years, one for a term of four years, and one for a term of six years, and (2) a vacancy caused by the death, resignation, or removal of a member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term. A member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

\* \* \* \*

(f) Every official act of the Commission shall be entered of record, and its hearings and records shall be open to the public. The Commission is authorized to make such rules as are necessary for the orderly transaction of its proceedings. Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure.

\* \* \* \*

(i) An administrative law judge appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the administrative law judge shall become the final order of the Commission within thirty days after such report by the administrative law judge, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

6. Rule 100 of the Rules of Procedure of the Occupational Safety and Health Review Commission, 29 C.F.R. § 2200.100, provides as follows:

*Rule 100 Settlement*

*(a) Policy*

Settlement is permitted at any stage of the proceedings. Settlements submitted for consideration after the Judge's decision has been directed for review shall be filed with the Executive Secretary. A settlement proposal shall be approved when it is consistent with the provisions and objectives of the Act.

*(b) Requirements*

Every settlement proposal submitted to the Judge or commission shall include, where applicable, the following:

(1) A motion to amend or withdraw a citation, notification or proposed penalty, notice of contest, or petition for modification of abatement;

(2) A statement that payment of the penalty has been tendered or a statement of a promise to pay; and

(3) A statement that the cited condition has been abated or a statement of the date by which abatement will be accomplished.

(c) *Filing; service and notice*

When a settlement proposal is filed with the Judge or Commission, it shall also be served upon represented and unrepresented affected employees in the manner prescribed for notices of contest § 2200.7. Proof of service shall accompany the settlement proposal. A settlement proposal shall not be approved until at least 10 days following service of the settlement proposal on affected employees.

Effective January 1, 1980, 44 Fed. Reg. 70,106 (1979)

. . . .

APR 10 1984

ALEXANDER L. STEVENS,

CLERK

No. 83-1298

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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL  
UNION AND ITS LOCAL 4-23, PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR AND  
AMERICAN PETROFINA COMPANY OF TEXAS

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT

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BRIEF FOR THE FEDERAL RESPONDENT  
IN OPPOSITION

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### QUESTION PRESENTED

Whether employees may challenge and the Occupational Safety and Health Review Commission may review a settlement agreement between the Secretary of Labor and an employer cited for violating the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, where the challenge is based on grounds other than the reasonableness of the period allowed in the settlement for abatement of the violation.

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1983

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No. 83-1298

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL  
UNION AND ITS LOCAL 4-23, PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR AND  
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**BRIEF FOR THE FEDERAL RESPONDENT  
IN OPPOSITION**

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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 718 F.2d 1341. The order of the Occupational Safety and Health Review Commission (Pet. App. 25a) is not reported. The opinion of the administrative law judge in OSHRC Docket No. 80-1671 (Pet. App. 31a-36a) is summarized at 1981 O.S.H. Dec. (CCH) para. 25,394. The opinion of the administrative law judge in OSHRC Docket No. 79-6847 (Pet. App. 37a-45a) is summarized at 1981 O.S.H. Dec. (CCH) para. 25,638.

## JURISDICTION

The judgment of the court of appeals was entered on November 7, 1983. The petition for a writ of certiorari was filed on February 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioners, the Oil, Chemical and Atomic Workers International Union and its Local 4-23, represent employees who in the fall of 1979 worked at the Port Arthur, Texas, oil refinery of respondent American Petrofina Co. of Texas. During that time, Occupational Safety and Health Administration (OSHA) inspectors investigated the refinery to determine whether the company was complying with the Occupational Safety and Health Act of 1970 (the Act or OSH Act), 29 U.S.C. 651 *et seq.* Pet. App. 2a. As a result of the inspections, the Secretary of Labor issued four citations and notifications of proposed penalties for violations of the Act. See 29 U.S.C. 658(a), 659(a). The company contested these citations. See 29 U.S.C. 659(c). The Occupational Safety and Health Review Commission consolidated the citations into two cases and assigned them to two separate administrative law judges for hearings. Shortly thereafter, petitioners elected to participate as parties to the proceedings. Pet. App. 2a-3a.

Before the hearings were to take place, the Secretary and the company settled both cases (Pet. App. 4a). The Secretary reduced the characterization of the violations from "serious" to "non-serious" and also reduced the proposed penalties. In exchange, the company withdrew its notices of contest. *Ibid.* Petitioners participated in the settlement negotiations but did not join the agreement because they objected to the recharacterization of the violations and to representations in the agreement that abatement had occurred (*id.* at 4a & n.7).

The administrative law judges approved the settlement agreements. The judge in OSHRC Docket No. 80-1671 held that petitioners lacked standing to object to the agreement because their challenge was not to the reasonableness of the abatement period (Pet. App. 35a). He also held that petitioners had meaningfully participated in the settlement negotiations and that the settlement was consistent with the provisions and objectives of the Act (*id.* at 35a-36a). The judge in OSHRC Docket No. 79-6847 held that characterization of a violation is a matter within the Secretary's prosecutorial discretion under the Act and found that the cited conditions had in fact been abated (*id.* at 41a-42a). The Commission granted petitioners' request for discretionary review of these rulings (*id.* at 28a, 29a) and denied the motions of the Secretary and the company to vacate the order directing review (*id.* at 25a-26a).

The Secretary filed a petition for review with the court of appeals. The Secretary contended that once an employer withdraws its notice of contest of a citation, the employees may not challenge a settlement agreement on grounds other than the reasonableness of the abatement period. Petitioners, on the other hand, maintained that the employees could challenge the settlement on other grounds as well. The court accepted the Secretary's interpretation.<sup>1</sup> It therefore vacated

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<sup>1</sup>As a threshold matter, the court held (Pet. App. 4a-8a) that the Commission's denial of the Secretary's motion was appealable under the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949).

The majority also construed Section 10(c) of the Act, 29 U.S.C. 659(c), and Fed. R. Civ. P. 24(a) as granting employees "equal standing with the original parties" (Pet. App. 18a (citation omitted)). The court therefore expressed agreement with petitioners' contention that "employees may participate fully as parties once the employer has filed a notice of contest, and hence are not limited to challenging the reasonableness of the abatement period at such a proceeding" (*id.* at 23a). Judge Jolly disagreed with this dictum (*id.* at 24a). This question is not presented here.

the Commission's order and remanded for dismissal of the petition for review (Pet. App. 24a). Two judges observed (*id.* at 21a) that "[t]he statutory language is susceptible of either construction, and either result can be viewed as part of a coherent statutory scheme." While stating that they were "inclined to favor" petitioners' interpretation, the judges noted that three courts of appeals had held to the contrary and that a fourth had accepted the Secretary's interpretation in dictum (*id.* at 22a). Thus, to avoid "administrative chaos" and "a gross disparity \* \* \* between the Secretary's ability to settle cases" in the various circuits, they followed the prior court of appeals' decisions (*id.* at 23a). The third member of the panel concurred in the result because he found the Secretary's interpretation more persuasive (*id.* at 24a).

#### ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioners contend (Pet. 6-9) that review is justified because the courts of appeals have reached conflicting conclusions on the question of the Secretary's authority to settle OSHA citations over the objections of employees and without Commission review. That contention is wholly without merit.

As petitioners acknowledge (Pet. 8), the decision of the court below upholding the Secretary's settlement authority is consistent with the decisions of every other court of appeals that has considered the question. See *Donovan v. International Union, Allied Industrial Workers*, 722 F.2d 1415 (8th Cir. 1983); *Donovan v. United Steelworkers*, 722 F.2d 1158 (4th Cir. 1983) (per curiam); *Donovan v. OSHRC*, 713 F.2d 918 (2d Cir. 1983); *OCAW v. OSHRC*, 671 F.2d 643 (D.C. Cir.) (per curiam) (dictum), cert.

denied, 459 U.S. 905 (1982); *Marshall v. OCAW*, 647 F.2d 383 (3d Cir. 1981); *Marshall v. Sun Petroleum Products Co.*, 622 F.2d 1176 (3d Cir.), cert. denied, 449 U.S. 1061 (1980). See also *Marshall v. OSHRC*, 635 F.2d 544 (6th Cir. 1980 (citation omitted)) " 'Congress intended to preclude employees and their representatives from usurping the Secretary's prosecutorial discretion [except insofar as they may contest the reasonableness of the abatement period]' ". Moreover, contrary to petitioners' assertion (Pet. 8), there is no conflict in reasoning between the decision below and the decisions of the other courts of appeals. The court below found the Secretary's interpretation of the Act to be "logical" (Pet. App. 21a), "reasonabl[e]" (*id.* at 23a), and "part of a coherent statutory scheme" (*id.* at 21a).

It is beside the point that two members of the panel were "inclined to favor" the contrary interpretation (Pet. App. 22a) and based their decision on a commendable desire to avoid "administrative chaos" and a circuit conflict (*id.* at 23a). In construing the Act, a court must uphold a reasonable interpretation of the Secretary that furthers the statutory purpose and complements the statutory scheme (*Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11, 13 (1980)) even if that interpretation is not the only reasonable one or the result that the court would have reached de novo. See *Udall v. Tallman*, 380 U.S. 1, 16 (1965).<sup>2</sup>

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<sup>2</sup>Petitioners argue (Pet. 10-12) that the Commission's interpretation of the Act, with which they agree, is entitled to deference. The Commission, however, is not a policymaking agency. *Donovan v. International Union, Allied Industrial Workers*, 722 F.2d at 1419; *Donovan v. OSHRC*, 713 F.2d at 930; *Marshall v. OSHRC*, 635 F.2d at 547; *Marshall v. Sun Petroleum Products Co.*, 622 F.2d at 1183, 1184; *Dale M. Madden Construction, Inc. v. Hodgson*, 502 F.2d 278, 280 (9th Cir. 1974). Its interpretations of the Act are therefore "not entitled to any special deference from the courts." *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 278 n.18 (1980) (citations omitted).



Thus, the cases are "really in harmony," and there is no "real and embarrassing conflict of opinion and authority between the circuit courts of appeal" that requires resolution by this Court. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392, 393 (1923).<sup>3</sup>

2. Petitioners incorrectly assert (Pet. 9-21) that the court of appeals' holding is contrary to the language, structure, and purpose of the Act.

a. Petitioners note that Section 10(c) of the Act, 29 U.S.C. 659(c), provides that the Commission shall afford a hearing to an employer that contests a citation and "shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief \* \* \*."<sup>4</sup>

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<sup>3</sup>The Fifth Circuit has shown no sign of retreating from its holding in this case. It recently followed the decision below in *Donovan v. International Association of Bridge, Structural & Ornamental Iron Workers*, 725 F.2d 994 (1984) (per curiam), in which it reversed a Commission order setting a hearing on employee objections to a settlement agreement and remanded to the Commission for dismissal of the petition for review. The question of the Secretary's settlement authority is also pending in the Sixth Circuit, *Donovan v. United Transportation Union*, No. 82-3771; in the Seventh Circuit, *Donovan v. Allied Industrial Workers*, No. 83-2831; and in the Eleventh Circuit, *Donovan v. International Chemical Workers Union*, No. 82-7322.

<sup>4</sup>Section 10(c) of the Act, 29 U.S.C. 659(c), provides in full:

If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5[, United States Code,] but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on



Petitioners argue (Pet. 13-14) that any proceeding in which the Commission's jurisdiction has been invoked must end with the issuance of a Commission order and that therefore the Commission may review a settlement agreement that would resolve a contested case. This argument ignores the fact that an uncontested citation is "deemed a final order of the Commission and not subject to review by any court or agency." 29 U.S.C. 659(a). An employer's withdrawal of its notice of contest as part of a settlement thus produces the same result that would have occurred if the employer had never contested the citation — an abatement requirement and penalty assessment that are "deemed a final order of the Commission."

b. Petitioners next contend (Pet. 14) that allowing employees to object to a settlement implements Section 10(c)'s direction to the Commission to provide affected employees with "an opportunity to participate as parties to hearings" and comports with the notion that "parties" are entitled to participate fully in litigation. However, "[t]hat section of the Act confers a procedural right on employees; it does not establish an independent entitlement to a hearing on the employees' objections to the substantive elements of an abatement plan. [T]hat question must turn on what

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findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirement in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

rights, if any, the Act confers upon [employees].’ ” *Donovan v. OSHRC*, 713 F.2d at 927-928 (footnotes omitted; brackets in original). Just because employees are permitted to become parties to any hearing on a contested citation, it does not follow that they may object to a settlement once the employer’s notice of contest is withdrawn. As the court below recognized (Pet. App. 21a), Section 10(c) may logically be construed “as granting conditional intervenor status to the employees, the condition being the continued participation of the employer.”

c. Equally unpersuasive is petitioners’ argument (Pet. 14-16) that Commission review furthers the policy underlying creation of the Commission, which petitioners identify as separation of the enforcement and adjudication functions under the Act.<sup>3</sup> In the first place, Congress did not require Commission involvement in every enforcement action brought by the Secretary. The Section 10(a) proscription against review of uncontested citations evidences Congress’s willingness to entrust to the Secretary alone the appropriate abatement of hazards in a large number of

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<sup>3</sup>Petitioners note (Pet. 16 n.20) that in deciding to separate prosecutorial and adjudicatory functions under the Act, Congress had in mind the model of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* They assert (Pet. 16 n.20) that Congress also had in mind cases under the NLRA holding that a charging party may challenge a proposed settlement of an unfair labor practice complaint and that therefore Congress could not have intended any lesser role for complaining employees under the OSH Act. Petitioners overlook the fact that at the time the OSH Act was passed, one court of appeals had held that a charging party under the NLRA has no right to a hearing on its objections to a settlement agreement. See *Local 282, International Brotherhood of Teamsters v. NLRB*, 339 F.2d 795 (2d Cir. 1964). Congress cannot be presumed to have adopted one view over the other without some affirmative indication of which it preferred. *NLRB v. Bildisco & Bildisco*, No. 82-818 (Feb. 22, 1984), slip op. 10.

cases.<sup>6</sup> Second, review of settlements retards rather than advances the other policy underlying the Commission's creation—providing “a very quick way” of dealing with contested cases. Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* (S. 2193, P.L. 91-596) 463 (Comm. Print 1971) (remarks of Sen. Javits). Because the requirement to abate violations is stayed until the Commission enters a final order on an employer-contested citation (see 29 U.S.C. 659(b)), Commission review of settlements “ ‘delays the day when a final order requiring abatement may be entered.’ ” *Marshall v. OCAW*, 647 F.2d at 387 (citation omitted). Indeed, were the Commission to issue its order “approving” a settlement immediately upon receiving the agreement, that order would be stayed for 30 days until finality attached. 29 U.S.C. 659(c). Thus, even in the best case, Commission involvement, instead of being “a very quick

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<sup>6</sup>The non-reviewability of uncontested citations also belies petitioners' related assertion (Pet. 17-18) that Commission review of settlements is necessary to fetter the Secretary's prosecutorial discretion. Since there is no qualitative difference between the Secretary's determination to issue a citation in the first place and his decision to modify one, *Donovan v. OSHRC*, 713 F.2d at 927, if the Secretary's discretion is not reviewable in situations where the employer does not contest the original citation, then it should not be reviewable in situations where the employer does not contest the modified citation.

Moreover, no authority cited by petitioners (Pet. 18 n.22) as limiting the Secretary's prosecutorial discretion compels a different result. Thus, while 29 U.S.C. 657(f) grants employees the right to “request an inspection” of their workplace, the Secretary need only conduct such an inspection if he determines there are reasonable grounds to believe that a violation or danger exists. After inspection, the Secretary must issue a citation only if he believes the Act has been violated. See 29 U.S.C. 658(a). And employee participation as a party in an employer-initiated proceeding is in addition to, not instead of, the Secretary's prosecution of his case. *Marshall v. OSHRC*, *supra*.

way" of dealing with the case, delays the abatement requirement that the settlement would make immediately effective.<sup>7</sup>

d. Petitioners dispute (Pet. 19-21) the relevance for present purposes of the provision of Section 10(c) limiting the grounds on which employees may challenge a citation that is not contested by the employer. However, that limitation, which permits an employee challenge solely with respect to the reasonableness of the abatement period, is plainly germane. While the Act does not expressly answer the question of employees' challenge rights once an employer withdraws its notice of contest, Section 10(c) does provide the answer in the most closely analogous situation—where the employer has not contested the citation in the first place. It would be anomalous if employees could challenge a citation on grounds other than the reasonableness of the abatement time in the former situation, but not the latter. As the Second Circuit has concluded, "[t]here is no justification for such an anomaly under the legislative plan of the Act or its legislative history." *Donovan v. OSHRC*, 713 F.2d at 929 (footnote omitted).

e. Finally, petitioners question (Pet. 21-22 n.25) whether the Secretary's settlement of citations without hearings before the Commission effectuates the basic remedial purpose of the Act—the rapid abatement of hazardous working conditions. See *Donovan v. OSHRC*, 713 F.2d at 927. They claim that there is no evidence that settlements were discouraged or that the abatement of hazards was delayed by Commission review during the eight-year period when

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<sup>7</sup>The delay engendered by proceedings before the Commission on a settlement is also inconsistent with employees' statutory right to contest a citation where they believe that an unreasonably long period of time has been allowed for abatement of a violation. See *Marshall v. Sun Petroleum Products Co.*, 622 F.2d at 1186 & n.18.

the Secretary submitted his settlements for Commission approval. Petitioners fail to note, however, that during that time, the Commission did not permit hearings on employee objections to settlements, except where the objections concerned the reasonableness of the abatement date. See *id.* at 921. Since avoiding the burdens of litigation is one of the reasons for settling cases, employers would be less willing to reach agreement with the Secretary if they could still be forced into litigation by employees. Moreover, since the Commission now permits intervening employees to contest citations on grounds other than the reasonableness of the abatement period (see *id.* at 921-922), it seems clear that the review process will take longer and that abatement, which is stayed during Commission proceedings, will be further delayed.<sup>8</sup> As the court below noted (Pet. App. 23a), the "unworkable result" that this would produce "is no small consideration [since] \* \* \* roughly nine out of every ten cases are settled prior to a hearing."

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<sup>8</sup>The two cases petitioners attack as having incorrectly "invoked policy considerations," *Donovan v. International Union, Allied Industrial Workers, supra*, and *Donovan v. OSHRC, supra*, are good examples of the delay that results from Commission review. In *Donovan v. International Union, Allied Industrial Workers, supra*, the Commission took over three years to disapprove the settlement. See 722 F.2d at 1417. In *Donovan v. OSHRC, supra*, Commission review took over four years. See *Secretary of Labor v. Mobil Oil Corp.*, 10 O.S.H. Cas. (BNA) 1905 (1982). Indeed, in the instant case, the Secretary and the company executed the settlements in November 1980 and January 1981 (Pet. App. 32a, 38a), more than two years before the Commission issued the order reviewed by the court of appeals (*id.* at 25a). None of these employers was required to institute the abatement called for by its agreement with the Secretary during these extended periods.

CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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APRIL 1984

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ANDER L. STEVAS.  
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IN THE

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**BRIEF IN OPPOSITION OF RESPONDENT  
AMERICAN PETROFINA COMPANY OF TEXAS**

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Supreme Court Rule 28.1

American Petrofina Company of Texas submits the following list of parent companies, partially-owned subsidiaries, and affiliates in compliance with Supreme Court Rule 28.1:

American Petrofina, Incorporated  
Petrofina Delaware, Incorporated  
American Petrofina Exploration Company

American Petrofina Holding Company  
Petrofina S.A.

Fina Supply Inc.

American Petrofina Marketing Inc.

Cosden Oil & Chemical Company

Cosden Technology, Inc.

Sigma Coatings, Inc.

Fin-Oil, Inc.

American Petrofina Pipe Line Company

**QUESTION PRESENTED**

Whether the Occupational Safety and Health Act of 1970 ("OSHA" or the "Act") permits employees or their representatives to challenge the terms of a settlement agreement reached by the Secretary of Labor and an employer after the employer has withdrawn its notice of contest.

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AMERICAN PETROFINA COMPANY OF TEXAS**

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Respondent American Petrofina Company of Texas ("American Petrofina" or the "Company") urges that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Donovan v. Oil, Chemical, and Atomic Workers International Union*, 718 F.2d 1341 (5th Cir. 1983), be denied for the reasons set forth below.

## STATEMENT OF THE CASE

The present controversy began in the fall of 1979, when Occupational Safety and Health Administration inspectors conducted inspections of a construction work site at American Petrofina's oil refinery at Port Arthur, Texas. As a result of the inspections, citations for alleged violations of several OSHA regulations relating to asbestos handling were issued to the Company's construction contractors and their subcontractors, and to American Petrofina as well.<sup>1</sup> The citations did not concern employee exposure to asbestos; rather, they related to such ancillary matters as the initial monitoring, tagging, and bagging of asbestos, and other non-asbestos related standards.

American Petrofina was not actually engaged in the work which was the subject of the OSHA citations, but was merely the owner of the construction project where the violations were alleged to occur. The citations issued to the contractors and subcontractors were settled without opposition by either their or American Petrofina's employees or authorized employee representatives. Those settlement agreements were subsequently affirmed.

In each of the two cases resulting from the citations issued to American Petrofina, the authorized employee representative, the Oil, Chemical, and Atomic Workers International Union and its Local 4-23 (the "Union"), elected party status, pursuant to Rule 20 of the Rules of the Occupational Safety and Health Review Commission (the "Commission"), 29 C.F.R. § 2200.20.<sup>2</sup> After lengthy negotiations, American Petrofina and the Secretary of Labor (the "Secretary") executed a compromise settlement agreement in each case. Although the

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<sup>1</sup> American Petrofina was cited on the ground that while its employees were not engaged in the construction work, they allegedly had access to the claimed hazards. Because of the consummation of the settlement agreements, those issues have not been litigated.

<sup>2</sup> The Union represents American Petrofina's refinery employees, rather than the employees who performed the construction work which is the subject of the citations.

Union was provided the opportunity for meaningful participation (and actually did participate) in settlement negotiations, it declined to execute the settlement agreements. Among other provisions contained in the agreements, the Company represented that all alleged violations set forth in the citations had been abated. The agreements also recited the fact that a meeting was held with the employees' representative regarding settlement prior to the drafting of the agreements so that the representative would have an opportunity for meaningful input. In exchange for the Company's agreement to withdraw its notices of contest, the proposed penalties were eliminated in one of the administrative proceedings (OSHRC Docket No. 80-1671), and reduced in the other (OSHRC Docket No. 79-6847).<sup>3</sup>

Separate hearings on the two settlement agreements were conducted, at which the Union's representative agreed that abatement had occurred because the construction project had been completed. Over the Union's objections, the settlement agreements were subsequently affirmed.

The Union petitioned for discretionary review in both cases. When the Commission granted the Union's petition, the Secretary filed a motion to vacate the Commission's direction for review. The Secretary's motion was denied on March 25, 1983. The Secretary then sought review of the denial of his motion in the United States Court of Appeals for the Fifth Circuit.

In a decision rendered on November 7, 1983, the Court of Appeals held that once an employer has withdrawn its notice of contest, a union's challenge to a settlement agreement is limited to the reasonableness of the abatement period, and the Com-

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<sup>3</sup> The Circuit Court opinion erroneously recites that the Company agreed to withdraw its notices of contest in return for, *inter alia*, "elimination of the penalties." 718 F.2d at 1344.



mission loses its jurisdiction to consider the employees' petition for review of the terms of the settlement agreement. Because the Union had never contested the reasonableness of the abatement period in this case, the Court of Appeals vacated the order of the Commission denying the Secretary's motion to vacate the review order and remanded the case to the Commission to dismiss the Union's petition for review.<sup>4</sup> The Union now seeks review of the Fifth Circuit's ruling.

### **REASONS FOR DENYING THE WRIT**

The petition fails to satisfy any of the criteria enumerated in Rule 17 of the Rules of this Court for review by certiorari.

#### **I. THE DECISION OF THE COURT OF APPEALS IS ENTIRELY CONSISTENT WITH THE UNIFORM DECISIONS OF ALL OTHER COURTS OF APPEALS WHICH HAVE ADDRESSED THE ISSUE OF THE AUTHORIZED EMPLOYEE REPRESENTATIVE'S RIGHT TO CONTEST SETTLEMENT AGREEMENTS.**

Petitioner contends that the courts of appeals have reached "conflicting conclusions" (Petitioner's Brief, at 6) on the issue of whether the Commission has jurisdiction to review a settlement agreement, and whether authorized employee representatives may challenge the terms of a settlement agreement, other than the reasonableness of the abatement period, after an employer withdraws its notice of contest. Conceding that the Court of Appeals "acquiesced in the decisions of the other circuits" (Petitioner's Brief, at 8 and 9), Petitioner strains to support its position by asserting that the reasoning, rather than the ruling, of the Court of Appeals differs from the decisions of the other circuits. This argument cannot withstand judicial scrutiny.

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<sup>4</sup> The Commission complied with the Circuit Court order by dismissing the petition for review on December 22, 1983.



To establish a conflict among the circuits within the meaning of Rule 17.1(a), a petitioner must show that the *decision* rendered by the court below conflicts with the decisions of other appellate courts on the same matter. A court's reasoning or method of analysis cannot establish a conflict warranting Supreme Court review where, as here, the ultimate ruling is in complete accordance with the decisions of other federal appellate courts.

In this case, the Fifth Circuit framed its holding as follows:

If the employer subsequently withdraws its notice of contest, however, the employees are limited to challenging the abatement period; and the Commission loses jurisdiction to entertain the employees' petition for review of the settlement agreement's terms. [Footnote omitted.]

718 F.2d at 1353. This ruling is fully consistent with the decision of every other court of appeals that has considered the question. The Second, Third, Fourth, and Eighth Circuit Courts of Appeals have uniformly held that an employer's withdrawal of a notice of contest to an OSHA citation deprives the Commission of jurisdiction to review a settlement agreement and to consider employee objections to its terms, except as to the reasonableness of the abatement period.<sup>5</sup> Commentary in

<sup>5</sup> *Donovan v. OSHRC (Mobil Oil Corp.)*, 713 F.2d 918 (2d Cir. 1983); *Marshall v. Sun Petroleum Products Co.*, 622 F.2d 1176 (3d Cir.), *cert. denied*, 449 U.S. 1061, 101 S.Ct. 784, 66 L.Ed.2d 604 (1980); *Marshall v. Oil, Chemical, and Atomic Workers International Union, Local 4-208 (American Cyanamid Co.)*, 647 F.2d 383 (3d Cir. 1981); *Donovan v. United Steelworkers of America*, \_\_\_\_ F.2d \_\_\_\_, 11 O.S.H. Cas. (BNA) 1698 (4th Cir. November 1, 1983); *Donovan v. International Union, Allied Industrial Workers of America*, 722 F.2d 1415 (8th Cir. 1983). See also *Marshall v. OSHRC (IMC Chemical Group, Inc.)*, 635 F.2d 544 (6th Cir. 1980); *Oil, Chemical, and Atomic Workers International Union, Local 3-499 v. OSHRC*, 671 F.2d 643 (D.C. Cir.), *cert. denied sub nom. American Cyanamid Co. v. Oil, Chemical, and Atomic Workers International Union*, \_\_\_\_ U.S. \_\_\_\_, 103 S.Ct. 206, 74 L.Ed.2d 165 (1982), which were also relied upon by the Fifth Circuit in its decision.

the Fifth Circuit panel majority's opinion on the rationale employed (or not employed) in the unanimous line of cases from other circuits is insufficient to warrant a grant of certiorari.

Significantly, the Fifth Circuit's ruling was expressly designed to achieve unanimity among the circuits. Recognizing the "need for uniformity," the Fifth Circuit stated:

Were we to march to the beat of our own drummer, a gross disparity would arise between the Secretary's ability to settle cases in this circuit and his ability to do so elsewhere. Therefore, . . . we acknowledge that the Act can reasonably be interpreted more than one way, and we adopt a course that at least will not precipitate administrative chaos.

718 F.2d at 1353. It is readily apparent from the opinion that the Fifth Circuit specifically intended to avoid a conflict with the decisions of other courts of appeals. Therefore, although the courts of appeals may have divergent views concerning the permissible extent of employee participation in adjudicatory proceedings under the Act prior to the consummation of a settlement agreement, the Fifth Circuit's decision regarding the Commission's jurisdiction to review settlement agreements creates no conflict with the decisions of other courts of appeals requiring resolution by this Court.

## II. THE RULING OF THE COURT OF APPEALS IS LEGALLY SOUND AND RAISES NO QUESTION WORTHY OF SUPREME COURT REVIEW.

The Court of Appeals correctly decided that the authorized employee representative was not entitled to a hearing on its objections to the terms of the settlement agreements reached by the Secretary of Labor and American Petrofina once the Company agreed to withdraw its notices of contest and when the reasonableness of the abatement period is not in issue. The Act requires that the Commission afford an opportunity for a hearing only if an employer files a notice of contest, or if

employees or their representative files a notice with the Secretary alleging that the established period of abatement is unreasonable. 29 U.S.C. § 659(c). If the employer's notice of contest is withdrawn, only the abatement period may be challenged by the employees. Thus, the Court of Appeals' ruling is supported by the Act's statutory language, its legislative history, the overwhelming weight of judicial authority, and sound considerations of public policy.

To confer upon a union standing to challenge the substantive provisions of the settlement agreement other than the reasonableness of the abatement period would usurp the prosecutorial discretion exclusively vested by Congress in the Secretary of Labor. *Marshall v. OSHRC (IMC Chemical Group, Inc.)*, *supra*, 635 F.2d at 550. This prosecutorial power includes the discretion to withdraw or settle citations issued to employers. And, as the Court of Appeals correctly recognized, any other result would effectively discourage employers from entering into settlement agreements. 718 F.2d at 1353. If employers believe that protracted litigation proceedings may ensue following the execution of settlement agreements, the incentive to resolve the matter expeditiously through the settlement process will be lost.

Certiorari is inappropriate in this case for an additional reason. Under Supreme Court Rule 17.1(c), a petition for a writ of certiorari may be granted when a federal court of appeals has "decided an important question of federal law which has not been, but should be, settled by this Court. . . ." Confronted with the same issue of an authorized employee representative's standing to challenge the terms of a settlement agreement, this Court has previously declined to grant certiorari. *See Marshall v. Sun Petroleum Products Co.*, *supra*. *See also Oil, Chemical, and Atomic Workers International Union, Local 3-499 v. OSHRC*, *supra*. The denial of certiorari in these similar cases indicates that the Supreme Court did not consider the question to be sufficiently important to merit its review.

This case does not present any unique facts to warrant a reversal of the Supreme Court's practice of denying review of the issue.

Moreover, in view of the particular factual background of this case, the statutory purposes of the Act would not be furthered by union intervention in the instant controversy. Because the authorized employee representative had an adequate opportunity to be heard on the settlement agreements during the actual settlement process, the Union may not claim that its objections were never afforded due consideration.<sup>6</sup> The Union does not even represent the employees who performed the construction work which was the subject of the citations. Rather, it represents American Petrofina's refinery employees who, the Union contends, had access to alleged construction hazards by virtue of their mere presence at the site.<sup>7</sup> In addition, the construction work which was the subject of the citations was performed not by American Petrofina, but by its contractors and subcontractors. Consequently, American Petrofina had available the defense that it could not be held liable for cited conditions which it did not create, cause, or for which it was not otherwise responsible.<sup>8</sup>

The Union's contention that the cited conditions have not been abated (Petitioner's Brief, at 4) is entirely erroneous. The Union presumes that American Petrofina is guilty of the

<sup>6</sup> Specifically, the authorized employee representative in these cases participated in extensive discussions with members of the Regional Solicitor's Office concerning the proposed settlement agreements. Before the settlements were reached, officials from the Regional Solicitor's Office held a conference attended by all parties, including a representative of the Union.

<sup>7</sup> So far as American Petrofina has been able to ascertain, no employees or representatives of the construction employees who were actually engaged in the removal of the asbestos (and the associated tasks of monitoring, tagging, and bagging) contested the settlements entered into by the employers involved.

<sup>8</sup> See *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081 (7th Cir. 1975). The merits of this defense were never reached or litigated because the citations were settled.

violations alleged in the citations. It is American Petrofina's position, however, that it is and always has been in compliance with the requirements of the standards. Because settlements were reached, the merits of the citations were never adjudicated and the Company has never litigated its numerous substantive defenses to the citations. The Company purposefully refrained from introducing any evidence as to its compliance with the pertinent standards at the administrative hearings because of its belief, based on established precedent, that the Union had no standing to challenge the settlement agreements.

Petitioner also claims that the settlement has failed to abate the hazard (Petitioner's Brief, at 21 n.25), even though the Union admitted at the administrative hearings that abatement occurred, even if for no other reason, by virtue of the fact that the construction project had been completed.<sup>9</sup> Petitioner's opposition to the settlement agreements is in fact an attempt to require compliance with the standards during all future construction projects, of whatever type, in all areas of American Petrofina's facility, whether or not they were the subject of the citations. Petitioner's Brief, at 4 n.2. The Union's effort to obtain a sweeping, prospective type of abatement plan in contravention of OSHA's established enforcement scheme does not merit review by this Court.<sup>10</sup>

<sup>9</sup> Transcript of Proceedings, OSHRC Docket No. 80-1671, November 14, 1980, at 11; Transcript of Proceedings, OSHRC Docket No. 79-6847, March 20, 1981, at 48.

<sup>10</sup> Denial of the Union's petition will not deprive the Union of a remedy in the future. The statute establishes a procedure whereby the Union can monitor the Company's compliance with the asbestos standards during future construction operations at the refinery. If the Union believes that a violation has occurred, it can lodge an employee complaint with the Secretary. The Secretary can then make an expedited inspection, determine whether a violation has in fact occurred, and determine the nature of the prosecution, if any, to conduct. 29 U.S.C. § 657(f). The Union's effort to circumvent the established statutory enforcement scheme should not be condoned.

Finally, Petitioner has argued that the Company contested the citation to avoid any duty to take corrective action. Petitioner's Brief, at 4 n.2. This argument is wholly devoid of merit. If American Petrofina were seeking to delay and thereby avoid its duty to abate the violation, it would not have entered into settlement agreements. Rather, such dilatory motives would have been better served by proceeding to full hearings on the merits of the citations, resulting in far more lengthy proceedings than those which would have taken place had the Union not opposed the approval of the settlement agreements.

In view of all the foregoing facts, it is eminently clear that this case does not present an appropriate vehicle to carve out an exception to the general statutory rule that an authorized employee representative has standing to object only to the reasonableness of the abatement period with respect to a settlement agreement.

### CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

This is to certify that on this 10<sup>th</sup> day of March, 1984, three copies of the foregoing Brief in Opposition were served upon Petitioners and the Respondent Secretary of Labor by placing same in the United States Mail, postage prepaid, addressed to their respective attorneys of record:

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APR 25 1984

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~~CLERK~~

No. 83-1298

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

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OIL, CHEMICAL, AND ATOMIC WORKERS  
INTERNATIONAL UNION AND ITS LOCAL 4-23,  
*Petitioners,*  
v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,  
and

AMERICAN PETROFINA CO. OF TEXAS,  
*Respondents.*

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**REPLY BRIEF IN SUPPORT OF THE  
PETITION FOR A WRIT OF CERTIORARI**

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The Secretary of Labor acknowledges that "roughly nine out of every ten [OSHRC] cases are settled prior to a hearing." Br. for Fed. Resp. at 11. That being so, it is apparent that the question presented here as to the respective roles of the Secretary and the Commission in the settlement process is central to the proper functioning of the Occupational Safety and Health Act. But notwithstanding the intrinsic importance of the issue and the desirability of a definitive ruling by this Court that would end the unseemly dispute between the Secretary and the Commission, the Secretary strains to show that the holding below is so self-evidently correct as to be unworthy of this Court's consideration; that effort is unavailing.

1. Remarkably the Secretary claims that "there is no conflict in reasoning between the decision below and the decision of the other courts of appeals." Br. for Fed. Resp. at 5. That claim is belied by the Secretary's own admission that the court below "based [its] decision" not on its agreement with the Secretary's contentions but on what the Secretary terms "a commendable desire to avoid 'administrative chaos' and a circuit conflict." *Id.* Indeed, the court of appeals here made it plain that if this had been a matter of first impression the court would have rejected the Secretary's position and upheld the Commission's rule requiring review of settlements. See Pet. App. 19a-23a.

The Secretary's felt necessity to pretend that the reasoning below accords with the reasoning of other courts reveals the emptiness of his claim that the question presented does not warrant consideration by this Court.

2. The Secretary's efforts to defend his position on the merits are equally flawed.

(a) The Commission's rule at issue—Rule 100 of OSHRC's rules of procedure which expressly requires Commission review of settlement agreements—was promulgated by the Commission pursuant to its express statutory authorization "to make such rules as are necessary for the orderly transaction of its proceedings." 29 U.S.C. § 661(f). The relevant inquiry, therefore, is whether the Commission exceeded the scope of its rulemaking authority in promulgating Rule 100. *Cf. Hanna v. Plumer*, 380 U.S. 460 (1965).

The Secretary attempts to sidestep that inquiry by arguing that the Commission "is not a policymaking agency" and that "[i]ts interpretations of the Act are therefore 'not entitled to any special deference from the courts.'" Br. for Fed. Resp. at 5 n.2. Indeed, the Secretary goes so far as to suggest that on questions concerning the Commission's rulemaking authority it is the

Secretary, not the Commission, who is entitled to deference. *Id.*

The courts of appeals "have differed," *Marshall v. Western Electric Inc.*, 565 F.2d 240, 244 (2d Cir. 1977), as to who is entitled to deference where the Secretary and the Commission are in disagreement on the meaning of a *substantive* provision of the Act or of a *substantive* regulation promulgated by the Secretary; even in that realm some appellate courts have held, contrary to the Secretary's argument, that the "Commission was designed to have a policy role," *Brennan v. Giles & Cotting, Inc.*, 504 F.2d 1255, 1262 (4th Cir. 1974), and that "[t]he Court[s] should therefore show great deference to the Commission's interpretation of the Act," *Dunlop v. Rockwell International*, 540 F.2d 1283, 1289 (6th Cir. 1976); see also *Brennan v. OSHRC (Republic Creosoting Co.)*, 501 F.2d 1196, 1198-99 (7th Cir. 1974) ("substantial deference").

However that controversy is resolved, there can be no doubt, given the express grant of rulemaking authority just quoted, that the Commission is entitled to establish *its own rules of procedure*. In promulgating Rule 100 the Commission did just that. And the judgment the Commission made as to the appropriate procedure to follow once its jurisdiction is invoked is at least entitled to the degree of deference ordinarily afforded like administrative determinations. *Cf. FCC v. Schreiber*, 381 U.S. 281, 289 (1965).<sup>1</sup> Thus, Rule 100 is subject to invalidation only if it is abundantly clear that Congress intended to preclude Commission review of settlements and that the Commission therefore exceeded the scope of its rulemaking authority in promulgating that Rule.

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<sup>1</sup> Indeed, because Rule 100 was promulgated by the Commission shortly after passage of the Act and was accepted by the Secretary at that time and for many years thereafter, there is an especially strong presumption that it falls within the Commission's rule-making authority. See Pet. at 10-12.

(b) The Secretary does not, in terms, make any attempt to demonstrate that the Commission has exceeded its authority; indeed the Secretary concedes that "the Act does not expressly answer the question of employees' challenge rights once an employer withdraws its notice of contest." Br. for Fed. Resp. at 10. The Secretary does, however, advance two arguments suggesting that settlement review is inconsistent with Congress' intent; neither argument can withstand scrutiny.

The Secretary first argues that "there is no qualitative difference between the Secretary's determination to issue a citation in the first place and his decision to modify one," and that "if the Secretary's discretion is not reviewable in situations where the employer does not contest the original citation, then it should not be reviewable in situations where the employer does not contest the modified citation." Br. for Fed. Resp. at 9 n.6; *see id.* at 8, 10. But as the Secretary himself acknowledges, "the Secretary must issue a citation . . . if he believes the Act has been violated," *id.* at 9 n.6, whereas there is no statutory constraint on the Secretary's decision to "modify" a citation as part of a settlement. Thus the two types of determinations are, indeed, "qualitative[ly] differen[t]," and the fact that Congress did not provide for review of the Secretary's "probable cause" determinations in issuing citations does not mean that Congress intended to preclude review of the Secretary's decisions to settle. To the contrary, review of the latter category of decisions accords with Congress' rationale in creating the Commission: avoiding the "great potential for abuse" that would exist if the Secretary were left with unbridled discretion in enforcing the Act. *See Pet.* at 14-16.

The Secretary also argues that permitting Commission review of settlements "retards rather than advances the other policy underlying the Commission's creation—providing a very quick way of dealing with contested cases." Br. for Fed. Resp. at 9. But Congress sought speedy dis-

positions in order to "effectuate[] the basic remedial purpose of the Act—the rapid abatement of hazardous working conditions." *Id.* at 10. To the extent settlement review delays the implementation of a settlement it is only because, in a particular case, the *employees* (through their representative) have concluded that the settlement so fails to "abat[e] a hazardous condition" that it is in their interest to challenge the settlement notwithstanding any delay in implementation that may result.

The Secretary's claim that Congress, in the name of promoting worker safety, intended to preclude employees from making such a judgment is a tacit slander on the Legislative Branch. We know of no evidence to suggest that the Congress that enacted the OSH Act had so little confidence in employees—and such great confidence in the Secretary—as to deliver the employees into the Secretary's hands. Indeed, all the evidence is precisely to the contrary, for Congress went on to great pains in enacting the Act both to assure that employees would have a substantial role in the Act's enforcement and, through the Commission, to place a check on the Secretary's discretion. *See* Pet. at 14-16.

Moreover, the Secretary's professed concern over the delay that settlement review entails simply has no applicability to a whole category of cases of which the instant one is a prime illustration. Although the Secretary complains that during the pendency of Commission review here the employer was not "required to institute the abatement called for by its agreement with the Secretary," Br. for Fed. Resp. at 11 n.8, the fact is that the reason the workers challenged the settlement agreement was that the agreement did not provide for any abatement whatsoever; as the Secretary elsewhere acknowledges the settlement proceeded from the premise that when the employer completed the construction project at issue "abatement had occurred." *Id.* at 2. The only remedy provided for by the settlement was a \$690 fine, and

the only effect of the challenge to the settlement was to delay the employer's obligation to pay that fine while a decision was made as to whether the absence of an abatement remedy (such as an order directing the employer to comply with the asbestos standard during future construction projects) made the settlement inconsistent with the purposes of the Act. There is simply no basis for concluding that Congress so valued speedy collection of fines as to preclude the litigation of such fundamental issues.

In sum, given the importance of the question presented to the enforcement of the OSH Act and the Secretary's failure to demonstrate that the decision below is so clearly correct as to be unworthy of this Court's attention, that question should be decided by this Court.

### CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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